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CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1900. 1902.

No 582. 2060. 54

METCALF BROTHERS & COMPANY, PETITIONERS,

vs.

BENJAMIN BARKER, JR., TRUSTEE IN BANKRUPTCY OF LESSER BROTHERS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MARCH 11, 1901.

(18,077.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 592.

METCALF BROTHERS & COMPANY, PETITIONERS,

vs.

BENJAMIN BARKER, JR., TRUSTEE IN BANKRUPTCY OF LESSER BROTHERS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 10, 1901.

1 United States Circuit Court of Appeals for the Second Circuit.

Present: The Honorable William J. Wallace, E. Henry Lacombe and Nathaniel Shipman, circuit judges.

In the Matter of LESSER BROTHERS, Bankrupts.

Petition of Metcalf Brothers & Co. to Superintend and Revise in Matter of Law Proceedings of the District Court of the United States for the Southern District of New York.

Certification of questions to the Supreme Court under the acts of March 3, 1891, and of July 1, 1898.

This matter came before this court upon a petition of Metcalf Brothers & Co. to superintend and revise in matter of law certain proceedings of the district court of the United States for the southern district of New York, wherein an order was made by said district court enjoining the petitioners, Metcalf Brothers & Co., from taking any further proceedings under any judgment obtained by them in the supreme court of the State of New York in a judgment creditors' action wherein certain transfers made by the bankrupts had been set aside as to them as fraudulent and void, and wherein re-
2 ceivers of the property of the bankrupts appointed by the said supreme court had been directed to pay to them the amount of their judgments at law upon which their said judgment creditors' action was founded.

For its proper decision of the matter this court desires the instruction of the Supreme Court upon the questions of law hereinafter stated, and hereby certifies the same to the Supreme Court of the United States for that purpose.

Statement of Facts.

On the 2d of October, 1896, Lesser Brothers, subsequently adjudged bankrupts, who were copartners, being then insolvent, transferred all their property, copartnership and individual, to certain favored creditors. All their outstanding accounts, being copartnership property, they transferred by instruments of assignment to Marcus A. Adler and others. They confessed various judgments in the supreme court of the State of New York in favor of Bernhard Moses and others, upon which executions were at once issued to the sheriff of the county of New York, who levied thereunder on all their tangible personal property, consisting of clothing material and stock in trade. This also was copartnership property, and, with the book accounts, comprised all their property except a piece of real estate owned by Israel Lesser individually and a ground
3 lease of another piece of real estate owned by Tobias Lesser individually. These two pieces of real estate the individuals owning them conveyed to Joseph Lilienthal.

After making these transfers and after the levy by the sheriff under the executions issued upon the confessed judgments and on the same day, by a fraud upon the court, in a collusive action in the supreme court of New York to dissolve the partnership, they procured the appointment of a receiver of the partnership property, Morris Moses, who was nominated by and in collusion with them. Subsequently a receiver nominated by certain creditors, James T. Franklin, was associated with Mr. Moses by the same court.

Various creditors of the bankrupts immediately commenced actions of replevin to recover portions of the goods in the hands of the sheriff. Their claims were conflicting with each other and with those of the confessed-judgment creditors, and in an action brought in the supreme court of New York by the receivers an order was made restraining the sale by the sheriff under the executions, directing a sale by receivers (Mr. Moses and Mr. Franklin being also appointed such receivers in that action), and that the latter should hold the proceeds of the sale subject to the claims of all parties, such claims to be determined in that action. Pursuant to this order, the goods were sold, and the receivers so appointed now hold the proceeds thereof. This order was made November 23, 1896. The action is still pending, undetermined.

4 On the 22nd day of October, 1896, and the 29th day of October, 1896, Metcalf Brothers & Co. procured judgments in the supreme court of the State of New York against the Lessers for $930.21 and $2,547.80 respectively, upon which executions were issued and returned unsatisfied.

On the 17th day of December, 1896, Metcalf Brothers & Co. commenced a judgment creditors' action in the supreme court of the State of New York, which came to trial on the 17th day of December, 1897, and as a result of which the transfers to which reference has been made and the proceedings for the appointment of the receivers were adjudged fraudulent and void as to them. The court, however, set aside the transfers of the copartnership property, not only in favor of Metcalf Brothers & Co., but also in favor of the receivers. It set aside the transfer of the real estate in favor of Metcalf Brothers & Co. alone. Judgment was entered on this decision April 6, 1898.

This judgment determined that the proceeds of the sale of the tangible property then in the hands of the receivers and the outstanding accounts or their proceeds in the hands of the transferees (to be accounted for under the judgment to the receivers) were to be administered by the receivers for the benefit of all the creditors of the copartnership equally, including Metcalf Brothers & Co., while the real estate transferred became subject to the lien of the judgments of Metcalf Brothers & Co. on October 22nd and 29th,

5 1896.

All parties except the receivers appealed from this judgment to the appellate division of the supreme court of New York; that court affirmed the judgment of the trial court as to the fraud, but reversed it in so far as it granted relief in favor of the receivers.

It directed the payment by the receivers to Metcalf Brothers & Co. of the amount of their judgments out of the money in the receivers' hands, and, since Metcalf Brothers & Co. were to be so paid, it reversed the judgment in their favor against Adler, one of the transferees of the accounts. Upon the ground that there was no proof of fraud, it also reversed it against the transferee of the real estate.

This decision was embodied in an instrument made the 30th day of December, 1898, entitled an "order," but which, after reciting the necessary facts, "ordered and adjudged" that the judgment of the trial term be modified as stated, and also "ordered and adjudged" that the transfers in question, except the transfer of the real estate, were fraudulent and void as to Metcalf Brothers & Co.; that the receivers be, and they were thereby, directed to pay to Metcalf Brothers & Co. the amount of their judgments, with costs, and that final judgment should be entered in accordance therewith. This instrument was filed in the office of the clerk of the appellate division of the supreme court of New York, and was the only paper signed by that court or kept in its records. A certified copy of it was
6 transmitted to the clerk of the supreme court, upon which, after the costs had been taxed, a final judgment was entered by the latter clerk on the 31st day of January, 1899, following in all essential respects its verbiage. The delay in the entry of final judgment was caused by various motions before the appellate division for reargument.

On the 12th day of May, 1899, Lesser Brothers filed in the district court of the United States for the southern district of New York a petition to be adjudged bankrupts, and they were adjudicated bankrupts on that day. Subsequently, and on the 7th day of June, 1899, Benjamin Barker, Esq., was appointed their trustee in bankruptcy.

From the judgment of the appellate division in the action brought by Metcalf Brothers & Co. all parties except Lilianthal, the transferee of the real estate, appealed to the court of appeals of the State of New York. That court affirmed the judgment of the appellate division in favor of Metcalf Brothers & Co., and also restored to them the rights awarded them by the judgment of the trial court, of which they had been deprived by the appellate division. The final result of the litigation was that the transfers in question were declared fraudulent and set aside in favor of Metcalf Brothers & Co. only; that as to all other persons they were (until impeached in a proper action) valid; that the receivers were directed to pay out of the funds in their hands to Metcalf Brothers & Co. the
7 amount of their judgments, and that those creditors could also proceed for the collection of their judgments, if necessary, against the transferees of the accounts and real estate.

The decision of the court of appeals was made on the 6th of February, 1900. The remittitur from that court to the supreme court was received and filed on the 12th day of March, 1900. On the 8th day of March, 1900, the bankrupts' trustee, upon affidavits of himself and his counsel, procured from the district court of the United States for the southern district of New York an order entitled: In the bankruptcy proceeding requiring Metcalf Brothers & Co. to

show cause on the 13th day of March, 1900, why a writ of injunction should not issue enjoining them from taking any further proceedings under any judgment in their creditors' action and so enjoining them in the interim. This order provided for its service upon the members of the firm of Metcalf Brothers & Co., but it was not in fact served upon any one but their attorneys *in* their judgment creditors' action. Metcalf Brothers & Co. appeared specially upon the return day of the order to show cause and filed a written objection that the district court was without jurisdiction, power, or authority over them in the premises; that no action or other proceeding was pending or had ever been begun against them in any way relating to the subject-matter of the proposed injunction; that they had not appeared in or been made a party to any proceeding founded upon the petition of Lesser Brothers to be adjudged bankrupts, and that
8 they had not been brought into court on any process or been given any notice of the order to show cause except that their attorneys in their creditors' action had received a copy thereof, and especially that no statute conferred upon the district court jurisdiction, power, or authority to issue any writ of injunction in the premises.

Their objection was overruled, and after an argument of the merits of the application the injunction was continued.

Subsequently, Metcalf Brothers & Co. presented a petition to this court to superintend and revise in matter of law the said proceedings of the district court.

Questions Certified.

Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision are:

1. Had the district court of the United States for the southern district of New York jurisdiction to make the injunction order in question?

2. If said court had jurisdiction to restrain Metcalf Brothers & Co. from receiving the fund in question, could such jurisdiction be exercised by summary proceedings?

3. Did Metcalf Brothers & Co. by the commencement of their creditors' action acquire a lien on the property of the bankrupts superior to the title of the trustee thereto?

4. If the lien acquired by the commencement of the creditors' action was inchoate merely, was it perfected by a judgment obtained more than four months prior to the filing of the petition of
9 the Lessers in bankruptcy within the meaning of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?

5. If the lien acquired by the commencement of the creditors' action was inchoate merely, was the judgment in the creditors' action, whenever obtained, one which is avoided by any of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?

In accordance with the provisions of section 6 of the act of March

3, 1891, establishing courts of appeal, &c., and of section 25 of the act of July 1, 1898, establishing a uniform system of bankruptcy, the foregoing questions of law are by the circuit court of appeals for the second circuit hereby certified to the Supreme Court.

E. HENRY LACOMBE,
U. S. Circuit Court.
N. SHIPMAN,
U. S. Circuit Judge.

10 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate was filed and entered of record in this office on the 5th day of March, one thousand nine hundred and one, and, as directed by the judges of said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

New York, March 5, 1901.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

11 [Endorsed:] United States circuit court of appeals, second circuit. In the Matter of Lesser Bros. Certificate. United States circuit court of appeals, second circuit. Filed Mar. 5, 1901. William Parkin, clerk.

Endorsed on cover: (Certificate.) File No., 18,077. U. S. C. C. of appeals, 2nd circuit. Term No., 592. Metcalf Brothers & Company, petitioners, *vs.* Benjamin Barker, Jr., trustee in bankruptcy of Lesser Brothers. Filed March 11th, 1901.

c. p. 57.

FILED
NOV 4 1902
JAMES H. McKENNEY
Clerk.

Opinions in Lower Courts.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Nov. 4, 1902.

IN THE MATTER

OF

TOBIAS LESSER, ISRAEL LESSER and SIMON LESSER, and the firm of LESSER BROTHERS,

Bankrupts.

APPLICATION

OF

METCALF BROTHERS & COMPANY, *Petitioners*, for Review of certain Proceedings, *etc.*

BENJAMIN BARKER, JR., Trustee in Bankruptcy,

Respondent.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

OPINIONS RENDERED IN THE COURTS BELOW.

ARGUED OCTOBER 30th, 1902.

C. G. BURGOYNE, Walker and Centre Street, N. Y.

Opinion rendered by the United States Circuit Court of Appeals and reported in 5 American Bankruptcy Reports, at page 320. This opinion was withdrawn and the questions certified to the United States Supreme Court.

United States Circuit Court of Appeals

SECOND CIRCUIT.

In the Matter
of
Lesser Brothers,
Bankrupts.

Petition of Manton B. Metcalf and others to review an order in bankruptcy of the District Court of the United States for the Southern District of New York.

Shipman, C. J.

This is an appeal from an order of the District Court of the United States for the Southern District of New York, whereby the members of the firm of Metcalf Bros. & Co., creditors of Lesser Brothers, bankrupts, were stayed from attempting to enforce an alleged lien in their favor by virtue of a judgment of

the Supreme Court of the State of New York upon their creditors' bill against the bankrupts.

The complicated facts in the case are stated in the opinion of the District Judge as follows:

> "On October 22nd and 29th, 1896, Metcalf Brothers & Company obtained judgments against the bankrupts in the Supreme Court of the State for the sums of $930.21 and $2,547.80 respectively, on which executions were issued and returned unsatisfied. Shortly before the entry of those judgments, viz., on October 2, 1896, Lesser Brothers being insolvent, confessed three judgments amounting in the aggregate to upwards of $18,000, upon which executions were on the same day issued and levies made by the Sheriff upon all the bankrupts' leviable property, consisting of a stock of clothing material, store furniture and fixtures. They also on the same day executed two assignments of a large amount of book accounts due the firm, and a deed of conveyance of premises 495 Manhattan Avenue and an assignment of the lease of premises 306 West Fifty-fifth street. On the same day also a partnership action was commenced for the dissolution of the firm, and on the same day by consent of the parties, Morris Moses was appointed receiver of the firm, and afterwards at the instance of some creditors, James T. Franklin was added as joint Receiver. Within a few days thereafter numerous actions for replevin were brought against the firm by creditors to recover back goods claimed to have been sold under fraudulent representations. The claims of the creditors to the goods were so conflicting that an action in equity was brought against them all by the partnership receivers in the State Court, and an injunction obtained against prosecuting the replevin suits, and an order was made on November 23, 1896, directing that certain of the goods claimed in replevin should be delivered to the claimants, and that the plaintiffs in the other actions in replevin might present their claims before a referee. The Receivers, the plaintiffs, were also appointed Receivers in their own suit, and were authorized to sell all the other goods, and to hold the proceeds in place of the goods, subject to the final order of the Court and subject to the

same liens as the goods. Under that order sales were made by the Receivers as authorized, and about $27,000, it is said, came into their hands as the proceeds thereof and of some other collections.

"Thereafter on December 19, 1896, Metcalf Brothers & Company, the judgment creditors, filed a creditor's bill in the State Court based upon their judgments of October 22nd and 29th, as above stated, against the partnership receivers and the persons to whom Lesser Brothers had confessed judgments and transferred the real estate, lease and book accounts as above stated, to have all those transfers declared fraudulent, as well as the partnership suit; and after trial, a decree therein was entered on April 6, 1898, adjudging the aforesaid assignments, confessions of judgment and transfers of the real estate, the lease and the accounts, fraudulent as against Metcalf and others, as well as against the partnership Receivers. The decree also declared that the real estate and lease conveyed, as above stated, were subject to the lien of the plaintiff's judgments first above stated; and directed that all the other property or its proceeds should be paid over or accounted for to the partnership Receivers.

"No receiver was ever appointed in the suit of Metcalf. That decree gave no directions as to what the Receivers should do with the property; but the opinion of Judge RUSSELL shows that it was designed to be held by the partnership Receivers for the benefit of the partnership creditors *pro rata*; and that any payment or preference to the complainants in that suit was intentionally denied (*Metcalf vs. Moses*, 22 Misc. Rep., 664.)

"From the decree last mentioned an appeal was taken by both parties to the Appellate Division, upon whose decision a judgment or decree was entered on January 31, 1899, affirming the decree below as to the fraudulent character of the transactions above stated, but adjudging that the complainants were entitled to be paid the former judgments out of the funds in the hands of the partnership Receivers; but reversing the decree below as respects the two assignments to Adler and Lilienthal as being unnecessary for the complainants' relief (35 App. Div., 596; 55 N. Y. Supp., 179). An appeal was

thereupon further taken by both parties to the Court of Appeals, which affirmed the judgment of the Appellate Division directing payment of the complainants' claims and adjudging all the transactions fraudulent, including also the appointment of the Receivers in the partnership suit as a fraud and imposition upon the Court. The remittitur from the Court of Appeals was filed a few days since, on or about March.

"While the latter appeal was pending in the Court of Appeals, Lesser Brothers filed their petition in bankruptcy in this Court on May 12, 1899, which was less than four months after the decree of the Appellate Division adjudging payment to Metcalf & Company out of the fund in the Receivers' hands; and the firm and its members were on the same day adjudicated bankrupts, and on the 7th day of June, 1899, Mr. Barker was appointed trustee.

"The present Bankruptcy Act (Section 67f), unlike the previous Acts of 1841 and 1867, declares that all judgments, attachments or other liens obtained through legal proceedings, etc.; within four months prior to the petition in bankruptcy 'shall be deemed null and void, * * * and the property affected by the levy, judgment, attachment or other lien shall be wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall on due notice order that the right under such lien, judgment, etc., shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the Court may order such a conveyance as shall be necessary to carry the purposes of this section into effect.' "

The District Court ordered that Metcalf Brothers & Co. should be enjoined from collecting under the judgment entered on January 31, 1899, from the Receivers any moneys in their hands as Receivers, but could proceed against the executors of Joseph Lilienthal to enforce their liens upon the real estate which had been fraudulently transferred by Lesser Brothers.

In the carefully stated opinion of the District Judge

(100 Fed. Rep., 433) upon the legal questions involved in this appeal we concur, and our conclusions can be stated as follows:

1. Inasmuch as the petition in bankruptcy was filed on May 12, 1899, less than four months after the entry of the decree of the Appellate Division which directed payment to Metcalf Brothers & Co. of their judgments at law, their inchoate lien upon the fund of $27,000 in the hands of the Receivers was discharged and released.

By Section 67*f* all liens obtained through legal proceedings within four months prior to the petition in bankruptcy become void, and the property affected by the judgment is released from the lien, but it is said that the equitable lien of the Metcalfs was obtained in December, 1896, when the creditors' bill was brought. It is true, that by the commencement of a creditors' bill in equity, the complainants acquire what is called an equitable lien upon the choses in action and equitable assets of the debtor, which simply means a right to a decree for priority of payment, in case of success, over other creditors. It is sometimes called an inchoate lien, or a contingent lien, but it is not a right in, or a right to hold a particular article of property. It is not like the lien obtained by the attachment of personal property in an action at law by virtue of which the Sheriff obtains either actual or constructive possession of the property attached, and in such case the lien is not obtained by the judgment, but by the attachment, and we are not now prepared to say that if the judgment is rendered within four months before the petition in bankruptcy is filed that the lien by attachment is vacated.

The so-called equitable lien under a creditor's bill upon the choses in action and equitable assets of the debtor is simply a right, "in the successful event of the action to priority of payment thereout, in preference to other creditors, irrespective of the priority of the respective judgments" (*First National Bank vs. Shuler*, 153 N.

Y., 163, 171). If the court which rendered the decree had power to create priority, the right to priority is perfected, but, if the judgment, so far forth as it directs priority, becomes waste paper, the lien is gone. In this case, it is not necessary to say that the entire judgment is null and void, because the judgment was to the effect that the transfers and assignments of personal property and the receiverships were fraudulent and void, and this part of the judgment is not affected by the Bankrupt Act. The lien, however, which was created by the judgment has become discharged by the provisions of section 67, and the Metcalfs cannot have the benefit of the decree which directs payment to them of their judgments in the actions at law because the preference created by the decree was made null by the Bankrupt Act.

2. The District Court had jurisdiction to stay the appellants by virtue of its power as a court of bankruptcy.

Inasmuch as the fund was in the custody of the State Court and had been in such custody prior to the institution of the proceedings in bankruptcy, it was proper to make no order in regard to the action of that court, but to direct the trustee in bankruptcy to apply to it for its order upon the receivers to make payment to him and, as Section 67 gives the court of bankruptcy power to make orders in the premises, it was also proper for that court to proceed as a court of bankruptcy, by order on notice upon a summary petition, and direct the Metcalfs not to go into the State Court upon their own motion and attempt to obtain payment. Subdivision 7 of Section 1 defines "court" to mean the court of bankruptcy in which the proceeding is pending, and to the court of bankruptcy power is specifically given by subdivision 15 of Section 2 " to make such orders, in addition to those specifically provided for, as may be necessary for the enforcement of this act." If this order is to be regarded as an injunction to stay pro-

ceedings of the State Court, it was authorized by clause 3 of the Twelfth General Order in Bankruptcy, which provides that applications to the Court of bankruptcy for an injunction to stay proceedings of a court of the State shall be heard and decided by the Judge.

In this case, the appellants have, by a litigation which lasted about three and one-fourth years and went through two Appellate Courts, obtained, without aid from any other creditor, a fund of $27,000 for the benefit of all the creditors from fraudulent insolvents, who, at the last moment went into bankruptcy, apparently to prevent the appellants from obtaining a substantial benefit from the protracted and expensive litigation. The outcome, so far as the appellants are concerned, seems inequitable. We think the order should be so modified as to permit them to become parties in the proceedings by the trustee in bankruptcy in the State Court, and present to that Court such considerations and facts as may bear upon an application for an allowance to them from the fund, in the nature of a reasonable compensation for their costs, expenses and disbursements in the litigation which resulted in the defeat of the fraudulent attempts of the bankrupts, in wresting the funds from the hands of receivers applied for in fraud of creditors and in its preservation for their actual benefit.

The order of the District Court appealed from is modified without costs of this Court by adding the clause as follows : " The trustee, however, shall make the said Manton B. Metcalf, Stephen A. Metcalf, Jesse H. Metcalf, and Edwin R. Dillingham and the firm of Metcalf Brothers & Company parties to any proceedings he may institute in the State Court to obtain money in the hands of the receivers, and the said appellants are allowed to appear in said court, make application for an allowance to them from said fund, as a reasonable compensation for their costs, expenses and disbursements in the litigation in the State Court, and obtain such allowance if in the opinion of the State Court it is proper and within its power to grant."

Opinion of the District Court, Reported in 100 Federal Reporter at Page 433.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

TOBIAS LESSER and others, bankrupts.

Petition of BARKER, Trustee.

In Bankruptcy. Stay of Creditor's Bill.

ANDERSON & ANDERSON for Barker.

STICKNEY, SPENCER & ORDWAY for Judgment Creditors.

HENRY V. ROTHSCHILD for Stieglitz & Ballin.

BROWN, J.—This is an application to the Court by a trustee in bankruptcy of Lesser Brothers upon an order directing Metcalf Brothers & Company, judgment creditors of the bankrupts, to show cause why further proceedings by them upon a judgment creditors' bill, pending in the Supreme Court of the State and seeking to have applied to their judgment certain assets of the bankrupts fraudulently conveyed, should not be stayed. A temporary injunction was granted until the hearing and decision of this motion. The facts are somewhat complicated, and the dates of the several proceedings, as well as the kind of assets affected, are important.

On October 22nd and 29th, 1896, Metcalf Brothers

& Company obtained judgments against the bankrupts in the Supreme Court of the State for the sums of $930.21 and $2,547.80 respectively, on which executions were issued and returned unsatisfied. Shortly before the entry of those judgments, viz., on October 2, 1896, Lesser Brothers being insolvent, confessed three judgments amounting in the aggregate to upwards of $18,000 upon which executions were on the same day issued and levies made by the Sheriff upon all the bankrupts' leviable property, consisting of a stock of clothing material, store furniture and fixtures. They also on the same day executed two assignments of a large amount of book accounts due to the firm, and a deed of conveyance of premises 495 Manhattan avenue and an assignment of the lease of premises 306 West Fifty-fifth street. On the same day also a partnership action was commenced for the dissolution of the firm, and on the same day, by consent of the parties, Morris Moses was appointed Receiver of the firm, and afterwards, at the instance of some creditors, James T. Franklin was added as joint Receiver. Within a few days thereafter numerous actions of replevin were brought against the firm by creditors to recover back goods claimed to have been sold under fraudulent representations. The claims of the creditors to the goods were so conflicting that an action in equity was brought against them all by the partnership receivers in the State Court, and an injunction obtained against prosecuting the replevin suits, and an order was made on November 23, 1896, directing that certain of the goods claimed in replevin should be delivered to the claimants, and that the plaintiffs in the other actions in replevin might present their claims before a referee. The Receivers, the plaintiffs, were also appointed Receivers in their own suit, and were authorized to sell all the other goods, and to hold the proceeds in place of the goods, subject to the final order of the Court and subject to the same liens as the goods. Under that order sales were made by the Receivers as author-

ized, and about $27,000, it is said, came into their hands as the proceeds thereof and of some other collections.

Thereafter, on December 19, 1896, Metcalf Brothers & Company, the judgment creditors, filed a creditors' bill in the State court based upon their judgments of October 22nd and 29th, as above stated, against the partnership receivers and the persons to whom Lesser Brothers had confessed judgments and transferred the real estate, lease and book accounts as above stated, to have all those transfers declared fraudulent, as well as the partnership suit; and after trial, a decree therein was entered on April 6, 1898, adjudging the aforesaid assignments, confessions of judgment and transfers of the real estate, the lease and the accounts, fraudulent as against Metcalf and others, as well as against the partnership Receivers. The decree also declared that the real estate and lease conveyed, as above stated, were subject to the lien of the plaintiffs' judgments first above stated; and directed that all the other property or its proceeds should be paid over or accounted for to the partnership Receivers. No receiver was ever appointed in the suit of Metcalf. That decree gave no directions as to what the Receivers should do with the property; but the opinion of Judge RUSSELL shows that it was designed to be held by the partnership Receivers for the benefit of the partnership creditors *pro rata;* and that any payment or prefence to the complainants in that suit was intentionally denied (Metcalf *vs.* Moses, 22 Misc. Rep., 664).

From the decree last mentioned, an appeal was taken by both parties to the Appellate Division, upon whose decision a judgment or decree was entered on January 31, 1899, affirming the decree below as to the fraudulent character of the transactions above stated, but adjudging that the complainants were entitled to be paid their original judgments out of the fund in the hands of the partnership Receivers; but reversing the decree below as respects the two assignments to Adler and Lilienthal as being

unnecessary for the complainants' relief (35 App. Div., 596; 55 N. Y. Supp., 179). An appeal was thereupon further taken by both parties to the Court of Appeals, which affirmed the judgment of the Appellate Division directing payment of the complainants' claims and adjudging all the transactions fraudulent, including also the appointment of the Receivers in the partnership, suit as a fraud and imposition upon the Court. The remittitur from the Court of Appeals was filed a few days since, on or about March,

While the latter appeal was pending in the Court of Appeals, Lesser Brothers filed their petition in bankruptcy in this Court on May 12, 1899, which was less than four months after the decree of the Appellate Division adjudging payment to Metcalf & Company out of the fund in the Receivers' hands; and the firm and its members were on the same day adjudicated bankrupts, and on the 7th day of June, 1890, Mr. Barker was appointed trustee."

The present Bankruptcy Act (Section 67*f*), unlike the previous Acts of 1841 and 1867, declares that all judgments, attachments or other liens obtained through legal proceedings, etc., within four months prior to the petition in bankruptcy

> "shall be deemed null and void * * * and the property affected by the levy, judgment, attachment or other lien shall be wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt, unless the Court shall on due notice order that the right under such lien, judgment, etc., shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the Court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

This provision, it has been held, applies to voluntary petitions. Section 70 declares that the trustee

shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, to all

> " (4) property transferred by him in fraud of his creditors."

The Court of Appeals having finally adjudged that all the conveyances above specified and the partnership receivership were fraudulent and void as to creditors, the trustee in bankruptcy is entitled by operation of law (Section 70*e*), to avail himself of the benefit of that adjudication in like manner as any judgment creditor of the bankrupt. The fund in question and the property transferred should, therefore, be delivered over to Mr. Barker as trustee in bankruptcy, subject only to any valid liens or charges against it. Upon the above facts what lien, if any, have Metcalf & Company, the judgment creditors, upon the fund in the hands of the partnership receivers?

No doubt by the recognized law of this State, creditors on filing a creditor's bill to reach equitable assets, or a fund not subject to a levy and sale on execution, acquire by filing the bill what is termed an equitable lien, which gives them on obtaining a decree a priority over other creditors subsequently seeking relief against the same fund. This equitable lien, however, is not a *jus in re;* it is not a vested property right like the common law lien of a person in possession for labor or care or maintenance, nor like a maritime lien or hypothecation with a similar vested property interest without possession; it is nothing more than a provisional equitable attachment of the fund for the purpose of satisfying any decree that may be obtained in that cause. It is, therefore, contingent upon the recovery of a valid judgment, and liable to be defeated by anything that defeats the judgment, or the right of the complainants to appropriate the fund. This is clear from the authorities and from the history of the growth of the recognition of this lien. (See Becker *vs.* Torrance, 31 N. Y., 631, 637; Lynch *vs.*

Johnson, 48 N. Y., 27, 33; Bank, &c., *vs.* Shuler, 153 N. Y., 163, 171; Ex parte Foster, 2 Story 131, 9 Fed. Cas., 508, where this subject is elaborately discussed; Smith *vs.* Gordon, 22 Fed. Cas., 554; Ex parte Waddell, 28 Fed. Cas., 1312, per BETTS, *J.*). In Edmonston *vs.* McLeod (16 N. Y., 543) this point was in effect directly adjudged, it being held that a final order appointing a receiver in supplementary proceedings (equivalent to a creditors' bill) was essential to perfect the equitable lien; and that as this had not been done, but the proceedings had been virtually abandoned, the defendant who had been in possession of the fund with notice of the proceedings, and having disposed of it, was not answerable to the plaintiff.

In the opinion of Judge RUSSELL in this very case also (22 Misc. Rep., p. 667) he says that

> " The plaintiffs here can only claim an equitable lien such as is ordinarily impressed upon property by a favorable judgment following the filing of a creditors' bill";

and in the opinion of the Appellate Division, RUMSEY, *J.*, it is said:

> " There is no logical or legal reason why the Court * * * should practically deprive them (the complainants) of the lien upon the property in the hands of the Receivers which they otherwise would have acquired by the entry of this judgment " (35 App. Div., 606).

Such a contingent or equitable lien, it is evident, cannot be superior to the judgment on which it depends to make it effectual, but must stand or fall with the judgment itself. Section 67*f*, therefore, in declaring that a judgment recovered within four months " shall be deemed null and void " &c., necessarily prevents the complainants from acquiring any benefit from the lien, or the fund attached, except through the trustee in bankruptcy *pro rata* with other creditors,

which in effect accomplishes the same result as the original judgment of RUSSELL, J., at Special Term.

Suppose that in an action for libel, or slander, or for a penalty, or for any other action that would die with the person, an attachment were levied for the full amount of the claim, as may be done in many of the States, Connecticut for example, although attachments in such cases are not allowed under the Code in New York; if the party die before judgment, and the action could not be revived, it is manifest that the attachment must fall; not because the attachment was not valid, but because no lawful judgment could be obtained to which it can be applied. And so if an undertaking had been given for a release of the property attached, manifestly the undertaking would also become null and void by the abatement of the action before judgment.

It cannot be otherwise here, since the only existing judgment by which this lien or the fund thereby attached could be made available to the plaintiffs, was recovered within less than four months of bankruptcy proceedings. The judgment at Special Term did indeed direct the property to be turned over or accounted for to the partnership receivers. That judgment was more than four months before the bankruptcy; and if still remained in force, it would be valid as against the trustee in bankruptcy, although as above stated it would result, as in bankruptcy, in an equal distribution among creditors, without preference to the complainants. But that judgment has been reversed by the Appellate Division, and the latter judgment was in that regard affirmed by the Court of Appeals. The result, therefore, is that there is no judgment authorizing payment of this fund to the complainants, or to any persons for their benefit, except the judgment entered within less than four months of the proceedings in bankruptcy, and that judgment, so far as it confers any preference upon the complainants, is made null and void by Section 67*f* of the Bankrupt Act.

The case of Brown *vs.* Nichols (42 N. Y., 26), is in

no way adverse to the above conclusion, but in entire accord with it. There the judgment debtor having died during the action, the suit was revived against his administrator ; and it was held that the lien acquired by the filing of the creditor's bill before his death, also survived and was applicable on the judgment afterwards obtained against the administrator. In that case there was nothing to prevent the rendition of a valid judgment through the revival of the action ; and the prior lien therefore remained available, and the administrator, it was held, took the assets charged with that lien. And such plainly would have been the result under the Act of 1867, which did not invalidate judgments acquired within four months like the present act. The fund here in question, therefore, having vested in the trustees in bankruptcy, though charged with an inchoate equitable lien, in case the plaintiff could legally make it available, is freed from it because the plaintiff did not recover and cannot recover any judgment by which they can avail themselves of it as against the trustee in bankruptcy.

As there are other suits and liens, however, affecting the fund in question, this Court should order, in accordance with the further provisions of Section 67*f*, that the right of the complainants under the lien and judgment "shall be preserved for the benefit of the bankrupts' estate," and such "conveyance thereof as shall be necessary" for that purpose.

Objection was interposed at the outset in behalf of Metcalf & Co., the complainants in the creditors' bill, that this Court has not jurisdiction over them to make any order in the premises. But Metcalf & Company, as creditors, are of necessity parties to the proceedings in bankruptcy ; and aside from this, if the above view of the legal rights of the parties is correct, it is manifest from the terms of the act that the Court has jurisdiction to restrain any person from illegally possessing himself of assets and depleting the estate, contrary to the terms of the act, and in fraud of the rights of other creditors (Sections 2 (6), (7), (15) ; Section 67*f* ;

In re Fellerath, 95 Fed., 121 ; *In re* Kenney, 95 Fed., 427).

The above ruling does not affect the complainants' right under their original judgments of November, 1896, to proceed by execution against the real estate on which those judgments were a legal lien. The effect of the decrees in the creditors' suit will moreover be to clear away the cloud upon the title of the real estate created by the fraudulent conveyances, and enable them to sell the property clear of that apparent charge, and subject only to prior legal encumbrances, if any. To that extent the stay should be modified and permit the entry of a further judgment, if that be necessary, adjudging all of said transfers and assignments and the receivership to be fraudulent and void.

It is not necessary to consider, in view of the above conclusion, whether the proceeds of the goods and chattels sold by the Receivers under the order of the Supreme Court, should be deemed still to retain their character as chattels, or as being equitable assets in the Receivers' hands.

Although the partnership Receivers under the adjudication of the Court of Appeals have no legal title to the property, they are still the custodians of it, as officers of the State Court appointed in the second equity suit as above stated. The fund is, therefore, in the custody of the State Court and the trustee should apply to that Court to make the proper order for the payment thereof by its Receivers to the trustees, in whom it is vested by the Bankrupt Act. The obligations of the Bankrupt Act are as binding upon that Court as upon this ; and it is not to be doubted that on proper application the State court will give appropriate directions (*Ex parte* Waddell, Fed. Cas. No. 17,027).

In cases of this character where the party on whom the burden has fallen loses the fruits of laborious litigation, and the full benefit of it accrues to others, it is competent for the Court to make a reason-

able allowance as indemnity for the costs and expenses by which these benefits have been obtained; and accordingly if the funds above named are turned over to the trustee without further unnecessary costs or expenses to the estate, such an allowance should be provided for on the settlement of the order to be entered hereon.

An order in accordance herewith may be submitted for settlement on two days' notice.

March 23, 1900.

No. 21[illegible] 57

FILED
APR 7 1902
[illegible]
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

No. [illegible].

METCALF BROTHERS & COMPANY,

Petitioners.

Filed April 7, 1902.

BENJAMIN BARKER, Jr., Trustee in bankruptcy of LESSER BROTHERS,

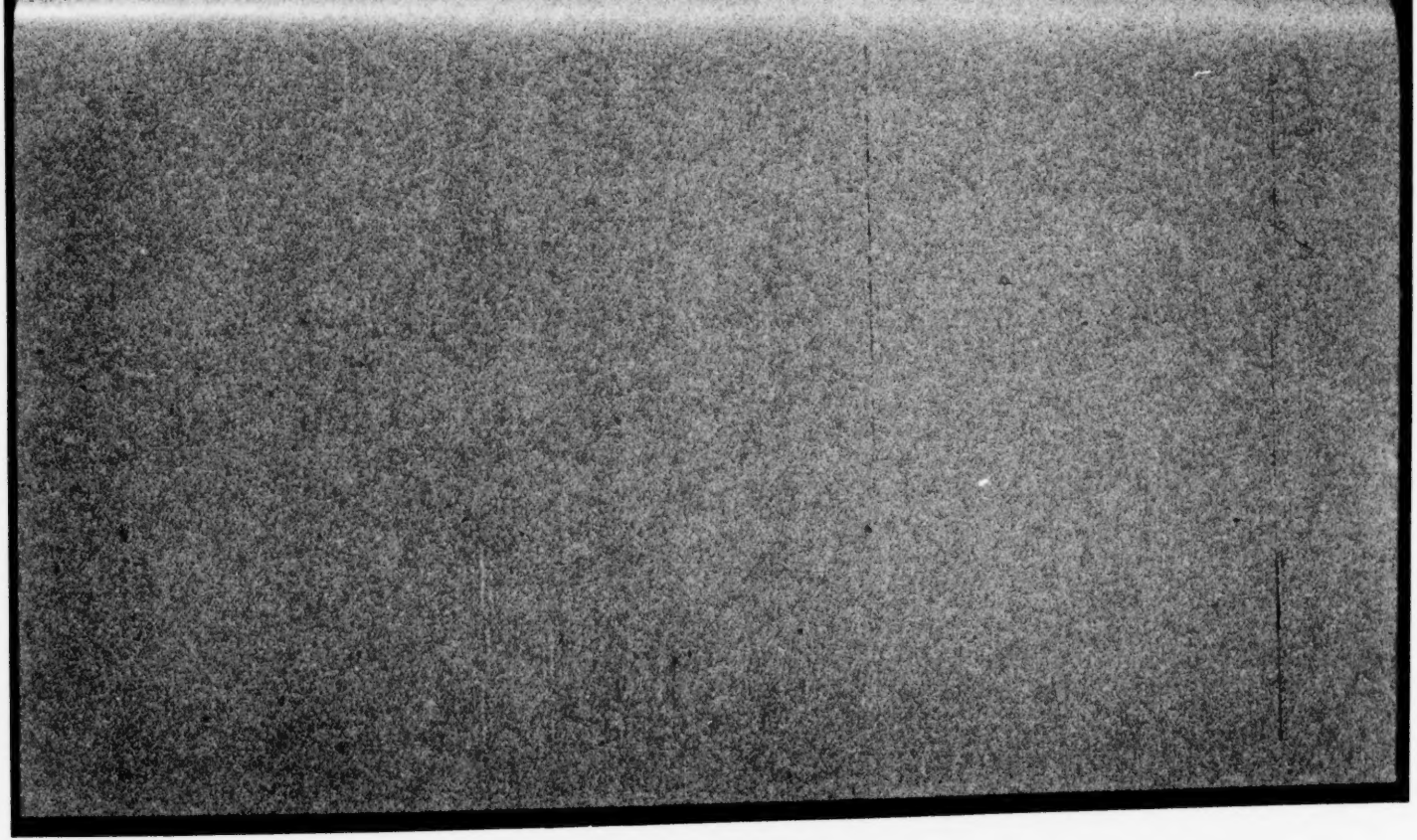
Respondent.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

NELSON S. SPENCER,
Of Counsel for the Petitioners.

[illegible] 38 Park Row, N. Y.



In the Supreme Court of the United States.

METCALF BROTHERS & COMPANY, Petitioners.	
AGAINST	October Term, 1901.
BENJAMIN BARKER, JR., Trustee in Bankruptcy of LESSER BROTHERS, Respondent.	No. 269.

Brief for Petitioners.

This matter comes to this Court upon a certificate of the United States Circuit Court of Appeals for the Second Circuit.

THE STATEMENT OF THE CASE

contained in the certificate is as follows:

On the 2d of October, 1896, Lesser Brothers, subsequently adjudged bankrupts, who were co-partners, being then insolvent, transferred all their property, copartnership and individual, to certain favored creditors. All their outstanding accounts, being co-partnership property, they transferred by instruments of assignment to Marcus A. Adler and others. They confessed various judgments in the supreme court of the State of New York in favor of Bernhard Moses and others, upon which executions were at once issued to the sheriff of the county of New York, who levied thereunder on all

their tangible personal property, consisting of clothing material and stock in trade. This also was co-partnership property, and, with the book accounts, comprised all their property except a piece of real estate owned by Israel Lesser individually and a ground lease of another piece of real estate owned by Tobias Lesser individually. These two pieces of real estate the individuals owning them conveyed to Joseph Lilianthal.

After making these transfers and after the levy by the sheriff under the executions issued upon the confessed judgments and on the same day, by a fraud upon the court, in a collusive action in the supreme court of New York to dissolve the partnership, they procured the appointment of a receiver of the partnership property, Morris Moses, who was nominated by and in collusion with them. Subsequently a receiver nominated by certain creditors, James T. Franklin, was associated with Mr. Moses by the same court.

Various creditors of the bankrupts immediately commenced actions of replevin to recover portions of the goods in the hands of the sheriff. Their claims were conflicting with each other and with those of the confessed judgment creditors, and in an action brought in the supreme court of New York by the receivers an order was made restraining the sale by the sheriff under the executions, directing a sale by receivers (Mr. Moses and Mr. Franklin being also appointed such receivers in that action), and that the latter should hold the proceeds of the sale subject to the claims of all parties, such claims to be determined in that action. Pursuant to this order, the goods were sold, and the receivers so appointed now hold the proceeds thereof. This order was made November 23, 1896. The action is still pending, undetermined.

On the 22nd day of October, 1896, and the 29th day of October, 1896, Metcalf Brothers & Co. procured judgments in the supreme court of the State of New York against the Lessers for $930.21 and $2,547.80 respectively, upon which executions were issued and returned unsatisfied.

On the 17th day of December, 1896, Metcalf Brothers & Co. commenced a judgment creditors' action

in the supreme court of the State of New York, which came to trial on the 17th day of December, 1897, and as a result of which the transfers to which reference has been made and the proceedings for the appointment of the receivers were adjudged fraudulent and void as to them. The court, however, set aside the transfers of the co-partnership property, not only in favor of Metcalf Brothers & Co., but also in favor of the receivers. It set aside the transfer of the real estate in favor of Metcalf Brothers & Co. alone. Judgment was entered on this decision April 6, 1898.

This judgment determined that the proceeds of the sale of the tangible property then in the hands of the receivers and the outstanding accounts or their proceeds in the hands of the transferees (to be accounted for under the judgment of the receivers) were to be administered by the receivers for the benefit of all the creditors of the co-partnership equally, including Metcalf Brothers & Co., while the real estate transferred became subject to the lien of the judgments of Metcalf Brothers & Co. on October 22nd and 29th, 1896.

All parties except the receivers appealed from this judgment to the appellate division of the supreme court of New York; that court affirmed the judgment of the trial court as to the fraud, but reversed it in so far as it granted relief in favor of the receivers. It directed the payment by the receivers to Metcalf Brothers & Co. of the amount of their judgments out of the money in the receivers' hands and, since Metcalf Brothers & Co. were to be so paid, it reversed the judgment in their favor against Adler, one of the transferees of the accounts. Upon the ground that there was no proof of fraud, it also reversed it against the transferee of the real estate.

This decision was embodied in an instrument made the 30th day of December, 1898, entitled an "order," but which, after reciting the necessary facts, "ordered and adjudged" that the judgment of the trial term be modified as stated, and also "ordered and adjudged" that the transfers in question, except the transfer of the real estate, were fraudulent and void as to Metcalf Brothers & Co.; that the receivers be, and they were

thereby, directed to pay to Metcalf Brothers & Co. the amount of their judgments, with costs, and that final judgment should be entered in accordance therewith. This instrument was filed in the office of the clerk of the appellate division of the supreme court of New York, and was the only paper signed by that court or kept in its records. A certified copy of it was transmitted to the clerk of the supreme court, upon which, after the costs had been taxed, a final judgment was entered by the latter clerk on the 31st day of January, 1899, following in all essential respects its verbiage. The delay in the entry of final judgment was caused by various motions before the appellate division for reargument.

On the 12th day of May, 1899, Lesser Brothers filed in the district court of the United States for the southern district of New York a petition to be adjudged bankrupts, and they were adjudicated bankrupts on that day. Subsequently, and on the 7th day of June, 1899, Benjamin Barker, Esq., was appointed their trustee in bankruptcy.

From the judgment of the appellate division in the action brought by Metcalf Brothers & Co. all parties except Lilianthal, the transferee of the real estate, appealed to the court of appeals of the State of New York. That court affirmed the judgment of the appellate division in favor of Metcalf Brothers & Co., and also restored to them the rights awarded them by the judgment of the trial court, of which they had been deprived by the appellate division. The final result of the litigation was that the transfers in question were declared fraudulent and set aside in favor of Metcalf Brothers & Co. only; that as to all other persons they were (until impeached in a proper action) valid; that the receivers were directed to pay out of the funds in their hands to Metcalf Brothers & Co. the amount of their judgments, and that those creditors could also proceed for the collection of their judgments, if necessary, against the transferees of the accounts and real estate.

The decision of the court of appeals was made on the 6th of February, 1900. The remittitur from that court to the supreme court was received and filed on the 12th day of March, 1900. On the 8th day of March, 1900, the bankrupts' trustee, upon affidavits of himself and his counsel, procured from the district court of the United States for the southern district of New York an order entitled in the bankruptcy proceeding requiring Metcalf Brothers & Co. to show cause on the 13th day of March, 1900, why a writ of injunction should not issue enjoining them from taking any further proceedings under any judgment in their creditors' action and so enjoining them in the interim. This order provided for its service upon the members of the firm of Metcalf Brothers & Co., but it was not in fact served upon anyone but their attorneys in their judgment creditors' action. Metcalf Brothers & Co. appeared specially upon the return day of the order to show cause and filed a written objection that the district court was without jurisdiction, power or authority over them in the premises; that no action or other proceeding was pending or had ever been begun against them in any way relating to the subject matter of the proposed injunction; that they had not appeared in or been made a party to any proceeding founded upon the petition of Lesser Brothers to be adjudged bankrupts, and that they had not been brought into court on any process or been given any notice of the order to show cause except that their attorneys in their creditors' action had received a copy thereof, and especially that no statute conferred upon the district court jurisdiction, power, or authority to issue any writ of injunction in the premises.

Their objection was overruled, and after an argument on the merits of the application the injunction was continued.

Questions Certified.

1. Had the district court of the United States for the southern district of New York jurisdiction to make the injunction order in question?

2. If said court had jurisdiction to restrain Metcalf Brothers & Co. from receiving the fund in question, could such jurisdiction be exercised by summary proceedings?

3. Did Metcalf Brothers & Co. by the commencement of their creditors' action acquire a lien on the property of the bankrupts superior to the title of the trustee thereto?

4. If the lien acquired by the commencement of the creditors' action was inchoate merely, was it perfected by a judgment obtained more than four months prior to the filing of the petition of the Lessers in bankruptcy within the meaning of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?

5. If the lien acquired by the commencement of the creditors' action was inchoate merely, was the judgment in the creditors' action, whenever obtained, one which is avoided by any of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?

Assignment of Error by the District Court.

The opinion rendered by the District Court upon enjoining the petitioners is reported in 100 Fed. Rep., 433.

The injunction order was made upon grounds, as appears from the opinion of the District Court, which are stated briefly as follows:

(1) That the Court had jurisdiction (p. 438); (2) that, although the petitioners acquired an equitable lien on the property fraudulently transferred by the commencement of their creditors' action, yet this lien was inchoate and must stand or fall with the judgment in that action (pp. 436, 437); (3), that the petitioners' only judgment perfecting their lien was the judgment

of the Appellate Division which was entered within four months of the adjudication in bankruptcy and therefore void (p. 437); and (4) that the petitioners' judgment inured to the benefit of the trustee (p. 436).

In all these respects, we contend, the court erred. We may add that the position of the court is not wholly consistent, in that it recognizes the petitioners' judgment for the purpose of establishing the lien and vesting title in the trustee (p. 438) but denies it any validity for the purpose of perfecting their rights as lienors.

Argument.

There are three important questions involved:

1. That of jurisdiction.

2. The nature of the lien acquired by the petitioners by the commencement of their judgment creditors' action.

3. Whether the petitioners' judgment against the bankrupts is brought within the terms of §67 of the Bankruptcy Act.

I.

The question of jurisdiction.

This question is to be considered under three heads:

a. Does the Bankruptcy Act confer any jurisdiction on the District Court such as was exercised in this instance?

b. If so, are not the petitioners still entitled, of right, to be brought into court in a plenary suit?

c. Even granting a general jurisdiction in the District Court, had it any such jurisdiction where the litigation is already in the State Court?

A.—We contend that the District Court was wholly without jurisdiction.

On this point, we submit, the decision is in conflict with the cases of

Bardes v. *First National Bank of Hawarden*, 178 U. S., 524, and
Louisville Trust Company v. *Comingor*, 184 U. S.

It is not open to controversy that the claim of Metcalf Brothers & Co., is one *adverse to the bankrupt*. Three years of litigation in the State Court have settled that fact. The claim is, also, of course, adverse to the bankrupt's trustee, who can claim only the bankrupt's property. The petitioners' position is much stronger than that of the claimants in the *Bardes* and *Comingor* suits; for there the claim was made through the bankrupt, and was unadjudicated, while here it is based upon a judgment of the State Court adjudicating the petitioners' rights *against the bankrupts*, and also against the persons to whom they had transferred their property.

In the *Comingor* case, this Court says of the defendant:

"He thus asserted a claim to each of these sums *adversely to the bankrupt*, and as outstanding when the petition in bankruptcy was filed, and these claims were in fact passed upon by the referee and the district judge as being adverse. This brought the controversy within the ruling in *Bardes* v. *First Nat. Bank*, 178 U. S., 524, and the questions attempted to be litigated before the referee and in the district court as to the allowance of the two amounts could only be raised in the district court by consent, and *then only by plenary suit*. If the jurisdiction of the district

court was not consented to, then *the state court, under the circumstances of this case, was the proper forum*, and the matters in dispute were to be disposed of there."

The petitioners did not consent to the jurisdiction of the District Court, but appeared specially only and protested against its exercise. (Record, p. 4). They are brought precisely within the decision in the *Comingor* case. They are not parties to the bankruptcy proceedings and were never brought into court by the service of any process. The action of the District Court was not a "bankruptcy proceeding" within any definition of the Bankruptcy Act. It was much more summary and drastic than the result of an action at law or a suit in equity because it enjoins and concludes the petitioners absolutely from litigating in the State Courts the rights claimed by the trustee—to which courts the trustee is nevertheless sent by the District Court to procure the property claimed by the petitioners. This has been done, too, without giving the petitioners opportunity to litigate their rights in the plenary action to which, we submit, they are entitled.

B.—The petitioners are entitled to have their rights adjudged in a plenary action to which all persons interested are made parties.

The decisions of this Court on this point also are, we submit, conclusive. The doctrine is re-asserted in the *Bardes* case and in the *Comingor case*. In the *Bardes* case the Court says (p. 532):

"It was also repeatedly held by this court that the "right of an assignee in bankruptcy *to assert a title in* "*property* transferred by the bankrupt before the bank- "ruptcy to a third person, who now claimed it adversely "to the assignee, *could only be enforced by a plenary* "*suit*, at law or in equity, under the second section of the "act of 1867; and *not by summary proceedings* "under the first section thereof, notwithstanding the "declaration in that section that the jurisdiction in

" bankruptcy should extend ' to the collection of all the
" ' assets of the bankrupt,' and ' to all acts, matters and
" ' things to be done under and in virtue of the bank-
" ' ruptcy,' until the close of the proceedings in bank-
" ruptcy. Smith *v.* Mason, (1871) 14 Wall., 419;
" Marshall *v.* Knox, (1872) 16 Wall., 551, 557; Eyster
" *v.* Gaff, (1875) 91 U. S., 521, 525."

The language of the Act of 1898 (§2, Subdv. 7) is no stronger in this respect than the Act of 1867.

Smith v. *Mason*, 14 Wall., 419, holds that "*Strangers*
" *to the proceedings in bankruptcy*, not served with
" process, and who have not voluntarily appeared
" and become parties to such a litigation, *cannot*
" *be compelled to come into court under a petition for*
" *a rule to show cause*, as in this case; nor is the exer-
" cise of such jurisdiction necessary, as the third clause
" of the second section of the Bankruptcy Act affords the
" assignee a convenient, constitutional, and sufficient
" remedy to contest every adverse claim made by any
" person to any property or rights of property trans-
" ferable to, or vested in, such assignee," and that a contest for a fund between a transferee and an assignee in bankruptcy cannot be determined in a summary way by the District Court sitting in bankruptcy, without due process of law, but only by a suit in equity or an action at law.

Marshall v. *Knox*, 16 Wall., 551, Bradley J.:
" *Neither the sheriff nor the lessor was a party to the*
" *proceedings in bankruptcy.* No process had been
" served upon them to make them such. *They were not*
" *before the court; and the court had no control or*
" *jurisdiction over them.* Under these circumstances
" the assignees applied for and obtained from the Dis-
" trict Court, a rule on the lessor and sheriff to deliver
" the goods to them. Had the court authority to make
" such a rule? Could such a rule be characterized as
" due process of law? * * * *If, therefore, ad-*
" *verse claims to property could be decided by the sum-*
" *mary action of the District Court, not only would*

"*the party claiming adversely to the assignee be de-*
"*prived of a trial by due process of law, but he would*
"*be without appeal.* An appeal was in fact denied in
"this case. We think it could not have been the
"intention of Congress thus to deprive parties
"claiming property, of which they were in possession,
"of the usual processes of the law in defence of their
"rights."

What the trustee has accomplished in this case is to have determined summarily, without the presence of necessary parties, *adverse claims* to property and has deprived the petitioners of a trial by due process of law to which this Court, in the cases cited, says they are entitled. What he has obtained is in effect a final judgment, as a necessary preliminary to which their rights, not only in relation to the trustee, but to a great number of parties not before the Court, including the officers of the State Court, were summarily and finally tried on affidavits? Surely there is no authority in the Bankruptcy Act or elsewhere for such an arbitrary exercise of judicial power.

C.—Irrespective of the statutory want of jurisdiction of the District Court and of the petitioners' right to be sued in a plenary suit, the Court, we submit, had no jurisdiction because the litigation is in and under the control of the State Court.

On this point also we submit that the decision is in conflict with the well-established rule as laid down by this Court.

The leading case on this point is

Peck v. *Jenness*, 7 How., 612.

It, and like cases in this Court and elsewhere, are, we submit, conclusive. It is cited with approval in the *Bardes* case (p. 534) and in *White* v. *Schloerb*, 178 U. S., 542 decided at the same time. Its doctrine is

repeated in *Louisville Trust Co.* v. *Comingor*, already cited.

Peck v. *Jenness* involved the discussion of a proceeding very like the one here instituted. In that case, as here, the District Court had decided that the lien of an attachment issued out of a State Court was defeasible and invalid as against an assignee in bankruptcy. But this Court made short work of its pretensions. It says of a plea of that fact: "It does not pretend to show how "the proceedings in the Court of Common Pleas had "been removed to the District Court, or how its judg- "ment on the cause pending before it could be thus "anticipated; nor that the District Court had found "any means of enforcing its decree by compelling the "sheriff to deliver the property attached to the as- "signee, and thus, in effect, destroy the lien." It proceeds to say that the jurisdiction of the State Court had attached more than a month (in this case it is over two years) before the passage of the act of bankruptcy and that the District Court had no supervisory power over the State Court. "It is a doctrine of law too long es- "tablished to require a citation of authorities, that, "*where a court has jurisdiction, it has a right to de-* "*cide every question which occurs in the cause*, and "whether its decision be correct or otherwise, its judg- "ment, till reversed, is regarded as binding in every "other court; and that, *where the jurisdiction* of a "court, and the right of a plaintiff to prosecute his "suit in it, *have once attached, that right cannot be* "*arrested or taken away by proceedings in another* "*court. These rules have their foundation, not merely* "*in comity, but on necessity. For if one may enjoin,* "*the other may retort by injunction, and thus the* "*parties be without remedy; being liable to a process* "*for contempt in one, if they dare to proceed in the* "*other.* * * * The fact, therefore, that an in- "junction issues only to the parties before the court, "and not to the court, is no evasion of the difficulties "that are the necessary result of an attempt to exercise

"that power over a party who is a litigant in another "and independent forum."

Rouse v. *Letcher*, 156 U. S., 47: "It is well settled "that where property is in the actual possession of a "court, this draws to it the right to decide upon con- "flicting claims to its ultimate possession and control."

Taylor v. *Caryl*, 20 How., 283; *Freeman* v. *Howe*, 24 How., 450, and *Covell* v. *Heyman*, 111 U. S., 176, are all cases laying down very forcibly the same doctrine.

The Courts maintained this position on the specific point here involved under the Act of 1841.

Clarke v. *Rist*, 3 McLean, 494.
Ex parte Waddell, 1 N. Y. Leg. Obs., 53; 28 Fed. Cas., 1312.

And under the Act of 1867.

Johnson v. *Bishop*, Woolworth, 324. Fed. Cas., 7,373.
Goodrich v. *Remington*, 6 Blatch., 515.
In re Clark, 3 N. B. R., 491, 524; Fed. Cas., 2,798.
Alden v. *Boston H. & E. R. Co.*, 5 N. B. R., 230; Fed. Cas., 152.
Sedgwick v. *Menck*, 1 N. B. R., 675.

Similar decisions have been made under the Act of 1898.

In re Gerdes, 102 Fed. R., 318.
In re Kavanaugh, 99 Fed. R., 928.
In re Russell, 101 Fed. Rep., 248.
Frazier v. *Southern Loan & Trust Co.*, 99 Fed. Rep., 707.
Pickens v. *Dent*, 106 Fed. Rep., 653.

In the last named cases the precise question here involved was decided by the Circuit Court of Appeals for the 4th Circuit. In the *Frazier* case there was, as here,

a creditors' action. It was commenced in 1894. Judgment was entered in favor of the plaintiffs in *June*, 1899. The bankrupt had been adjudicated such in *April*, 1899. The bankrupt's trustee procured from the District Court, upon petition, an order restraining a sale under the decree in the creditors' action and the District Court subsequently undertook to sell the property itself through the trustee. The Court after reviewing the authorities concludes:

"For the reasons stated, we hold *that, the state court* "*having acquired jurisdiction* of the subject matter and "taken possession of the property more than four "months before the adjudication in bankruptcy, it *must* "*be allowed to remain in control of the same, and to* "*dispose of it under its own decrees.*"

In the *Pickens* case, the creditors' action had been commenced in 1889 and was still pending when the fraudulent transferee was adjudicated a bankrupt. The Court followed the *Frazier* case, saying: "Con- "sidering the peculiar character of our government, and "keeping in view the forbearance which courts of co- "ordinate jurisdiction exercise towards each other, it "follows that the court which first obtains rightful "jurisdiction over the subject matter of a controversy "must by all other courts be permitted to proceed "therein to final judgment. The federal courts will "not interfere with the administration of affairs law- "fully in the custody and jurisdiction of a state court, "nor will they permit the courts of the states to inter- "fere concerning litigation rightfully submitted to the "decision of the courts of the United States. The "bankrupt act of 1898 does not in the least modify this "rule, but with unusual carefulness guards it in all of its "detail, provided the suit pending in the state court "*was instituted* more than four months before the dis- "trict court of the United States had adjudicated the "bankruptcy of the party entitled to or interested in "the subject matter of such controversy."

II.

The nature of the petitioners' lien.

By the commencement of their judgment creditors' suit in December, 1896, the petitioners acquired a lien upon all of the equitable assets of the judgment debtors. They had previously acquired a judgment against their debtors and the commencement of this suit was for the purpose of executing it. Their suit was "an equitable execution;" by commencing it they made "an equitable levy," and acquired "a specific lien" upon the property upon which that levy was made. Their claim against their debtors had already been adjudged valid and the only question involved in the creditors' suit was whether the property sought to be used for the satisfaction of their judgment is that of the judgment debtor. This lien is an absolute charge upon the property transferred, and any title which the trustee may acquire to the property by virtue of proceedings to avoid the transfers by the bankrupts is subject to it.

The District Court concedes that by the commencement of their creditors' suit the petitioners acquired an equitable lien upon the property transferred by the bankrupts. No question is raised that the assets affected were not equitable assets. No such question can properly be raised, for all the merchandise and tangible personal property originally subject to levy and sale under an execution has long since been converted into equitable assets by sale under an order of the Supreme Court of New York and is under the jurisdiction of that Court. (*Lawrence* v. *Bank of the Republic*, 35 N. Y., 320; *Thurber* v. *Blanck*, 50 N. Y., 80; *Briem* v. *M. N. Bank*, 127 N. Y., 508.) But the Court maintains that the lien is merely an inchoate or contingent one and that, if a judgment which awards the judgment creditors the property upon which they have levied is obtained within four months of the filing of a petition in bankruptcy by the judgment

debtors, both the judgment and the lien theretofore acquired by the commencement of the suit are avoided by the provisions of the bankruptcy act.

In this it opposes itself to a long line of consistent authorities, and every other Court, federal or state, which has considered the question since its decision has refused to follow it.

I.—*The lien is acquired by the commencement of the suit and is an absolute charge on the property transferred by the bankrupts.*

Miller v. *Sherry*, 2 Wall., 237: "The *filing of a* "*creditor's bill* and the service of process *creates a* "*lien* in equity upon the effects of the judgment debtor. "*It has been aptly termed 'an equitable levy.'*"

The case of *Storm* v. *Waddell*, 2 Sand. Ch. 494, which is cited as an authority for the statement in the text, contains a long and very learned exposition of the law on the points involved in this appeal. It is a precise authority and is directly opposed to the position of the District Court. It will be considered hereafter.

In *Freedman's Savings & Trust Co.* v. *Earle*, 110 U. S., 710, 716, the Court, speaking of the complainant in a creditor's suit, says:

"*As his lien begins with the filing of the bill*, it is "subject to all existing encumbrances, *but is superior* "*to all of subsequent date.* * * * *It is the execu-* "*tion first begun to be executed, unless otherwise regu-* "*lated by statute, which is entitled to priority. The* "*filing of the bill, in cases of equitable execution, is* "*the beginning of executing it.*" (p. 719): "In every "such case the equity of redemption could only be "applied after sale by the executor or administrator in "the ordinary course of administration, subject to what-"ever liens may have been imposed upon it in the life-"time of the mortgagor, and among them, as we have "seen, is that of an execution creditor who has filed his

" bill to subject it to the payment of his judgment. So, in " other cases where the rule of equality in distribution, " as to equitable assets, applies, as in cases of assignments " by the debtor himself for the payment of debts general- " ly, *and in cases of bankruptcy and insolvency*, except " as otherwise expressly provided by statute, the estate " passes, subject to existing liens, *including that of an* " *execution creditor who had previously filed a bill to* " *subject the equitable interest of the debtor, and his* " *priority is respected and preserved.*"

The Federal Courts have announced the same doctrine under the former bankrupt acts.

Act of 1841.

Ex parte General Assignee, 1 N. Y. Leg. Obs., 131; Fed. Cas., 5,305, D. C., N. D. N. Y., Conkling, D. J., (1842): "No one doubts, that at some stage of it, the " prosecuting creditor acquires an exclusive right to sat- " isfaction out of the property of the defendant when " it is not bound by any prior lien. This right can be " nothing less than a lien valid by the laws of the state; " and the only question is at what stage of the proceed- " ings does it attach. And upon this point the de- " cisions of the courts appear to me *to leave no room for* " *doubt*. It has been repeatedly decided that *such lien* " *is acquired at the commencement of the suit*; that is " to say, by the filing of the bill and the service of sub- " pœna. It is sometimes called a 'preference,' some- " times a 'priority,' sometimes simply a 'lien,' and " sometimes a 'specific lien:' and it has uniformly been " held *to prevail over any subsequent voluntary assign-* " *ment* by the debtor; and, what is still more perti- " nent, and, as it seems to me, ought of itself " to be nearly decisive of the question in this " court, over a subsequent assignment under the " insolvent acts. * * My conclusion then is, " that *by the institution and diligent prosecution, of* " *a suit* by a creditor's bill, without collusion with the " defendant, and in good faith, *the complainant acquires*

"*a lien on the property* of the defendant *which is not* "*divested by a decree of bankruptcy* entered upon a "petition filed by or against the defendant, subsequently "to the full commencement of the suit. * * * "If the complainant, after filing his bill and obtain- "ing an injunction fails to prosecute his suit with "proper diligence and to obtain the appointment of a "receiver, the case of Osborn *v.* Heyer, 2 Paige, 342, "is an authority for saying that his injunction will be "dissolved and his lien superseded."

The application in this case was by the assignee in bankruptcy to restrain creditors of bankrupts from further prosecution of a creditor's bill in the Court of Chancery of New York, which had not proceeded the judgment. The application was denied.

Clark, Assignee, v. Rist, 3 McLean, 494; Cir. Ct., D. Ohio, 1844. Upon a bill by assignment in bankruptcy the Court refused to issue an injunction to restrain proceedings in State Court. There had been *no judgment* in the creditors' suit before the adjudication in bankruptcy.

"From the language here used, it is unde- "niable that the lien of the judgment creditor is "coeval with the date of the service of the subpœna "in chancery. This, it is understood, is in accordance "with the uniform construction of the law by the courts "of Ohio, and the practice of those courts under it. The "statute proceeds on the principle, that *by the judgment* "*at law* the creditor acquires an inchoate right to the "equitable interest of the judgment debtor; which, how- "ever, can only be perfected and made available, by a "decree of sale by a court of chancery. But it is "within the evident design of the statute, that *from the* "*time of the service of the process in the chancery pro-* "*ceeding, legal validity and force are given to this* "*previously existing but imperfect right. Under a* "*similar statute in New York, the same practice and* "*the same principle of construction have obtained in the* "*courts of that state.* * * * The lien of "the judgment creditors, though not perfect

"on the rendition of the judgments, *became "so upon the service of the process in chan- "cery*, which was prior to the filing of the application "in bankruptcy. These creditors then occupy the "same position, and are entitled to the same rights, as "if the bankrupt had possessed the legal estate, instead "of an equitable interest, in the lands mentioned in the "bill. Their liens are saved under the bankrupt law; "and the state court having rightfully taken juris- "diction of the proceedings, designed to perfect those "liens, may retain it, till the object sought for is con- "summated, in accordance with the statute. * * * "By these judgments, and the subsequent pro- "ceedings thereon in the state court, the de- "fendants in the bill acquired a *bona fide lien*, prior to "the filing of the petition in bankruptcy. The equitable "interest of the bankrupt, in the property in question, "did not therefore pass to, and rest in, his assignee. " * * * When a state tribunal has rightfully taken ju- "risdiction of a case, though having some connection with "an estate in bankruptcy, it affords no sufficient reason "for its withdrawal from that jurisdiction, that a fed- "eral court might have taken cognisance of it. And "it is proper, *that the courts of the nation should cau- "tiously abstain from the unnecessary exertion of "powers, which may bring them into conflict with the "state courts*. Nothing can tend to the more serious "disturbance of the harmonious action of the state and "federal authorities, than these conflicts. And as far "as practicable, consistently with the operation of the "just powers of each, they are to be studiously "avoided."

Act of 1867.

Johnson, Assignee, v. *Rogers*, 15 N. B. R., 1; Dist. Ct. N. Y., 1876. The action was by an assignee in bankruptcy to set aside a general assignment as fraudulent. Judgment creditors were parties.

An action was pending by certain creditors at the time the petition of bankruptcy was filed to set aside

the assignment but it had not proceeded to trial or judgment.

Wallace, D. J.: "The assignee in bankruptcy, "though he represents all the creditors of the bankrupts, "acquires only the title of the bankrupts, except as he "is also invested with the right of creditors to assail "fraudulent transfers, and with title to property con- "veyed by the bankrupts contrary to the provisions of "the bankrupt act. *With these exceptions his title is* "*subject to all liens existing upon the property, legal* "*or equitable, at the time of the commencement of the* "*proceedings in bankruptcy.*" * * * It is "urged for these defendants that, by the filing of "their creditors' bill, they acquired an equitable lien "upon all the assets in the hands of the original as- "signees, which lien is not defeated by the proceedings "in bankruptcy. If such a lien was acquired, *it is not* "*defeated by the bankruptcy proceedings, but is to be* "*recognized and enforced by this court:* the more dif- "ficult inquiry is, as to the nature and extent of the "lien. Where such an action is brought to reach choses "in action, or property not subject to sale upon execu- "tion, according to the weight of authority *the lien is* "*acquired by the mere commencement of the action.*"

The opinion cites, among other authorities, *Storm* v. *Waddell*, 2 Sandf., Ch. 494 (to which reference has already been made as directly opposed to the position of the District Court), and holds that the plaintiffs in the judgment creditors' action have an equitable lien on the interest of the bankrupt in property not the subject of levy, which came to the hands of the complainant, to the amount of their judgment together with costs in State Court.

Kimberling v. *Hartly*, 1 Fed. Rep., 571, Cir. Ct. E. D., Kansas, 1880. Action of ejectment by bankrupt's vendee to recover property sold under judgment creditor's action in State Court.

Caldwell, J.: "*The law is well settled that the filing of such a creditor's bill,* and the service of process in the action, *create a lien* in equity upon the lands described in the bill, and entitle the plaintiff to priority over other creditors. (Storm *v.* Waddell, 2 Sand. Ch., 494; Tilford *v.* Burnham, 7 Dana, 110; Maffit *v.* Ingham, *id.*, 495; Hartshorn *v.* Eames, 31 Me., 93; Newdigate *v.* Jacobs, 9 Dana, 18; McDurmott *v.* Strong, 4 John. Ch., 687; Spader *v.* Davis, 5 John. Ch., 280; Carr *v.* Farrington, 63 N. C., 560; Fetter *v.* Cirode, 4 B. Mon., 482; Day *v.* Washburne, 24 How., 352; Clark *v.* Rist, 3 McLean, 494.) 'It has been aptly termed an equitable levy' (Miller *v.* Sherry, 2 Wall., 249). And *this lien is not displaced by the subsequent bankruptcy of the judgment debtor* but is protected by the bankrupt act. Clark *v.* Rist, 3 McLean, 494; Sedgwick *v.* Menck, 6 Blatch., 156; Parker *v.* Muggridge, 2 Story, 334; Storm *v.* Waddell, *supra;* Carr *v.* Farrington, *supra;* Fetter *v.* Cirode, *supra;* Newdigate *v.* Jacobs, *supra*; McDurmott *v.* Strong, *supra;* Goddard *v.* Weaver, 1 Wood., 260; Yeatman *v.* Savings Inst., 95 U. S., 764; Stewart *v.* Platt, U. S. Sup. Ct., 1879. * * * But in any suit brought by the assignee for this purpose the creditors' liens on the property, whether acquired by creditors' bill or otherwise, would not be displaced or annulled; and, if the suit was successful, the assignee would have to distribute the fund according to priority of liens and right between the creditors. And if the property did not exceed in value the amount of Hartly's lien upon it, and other creditors would derive no benefit from the suit, *the assignee acted wisely in not intervening and allowing the lien creditor and the bankrupt to settle the controversy between themselves in the state court* without expense to the estate. * * * The judgment creditor *filed his bill*, had a subpœna served, and *thereby acquired a lien* before the commencement of proceedings in bankruptcy. He did not prove his debt against the estate of the bankrupt, or *in any matter voluntarily submit himself to the jurisdiction of the bankrupt court.* * * *

"*The discharge of the bankrupt pending the suit did* " *not discharge or impair the lien acquired by the com-* " *mencement of the suit.*"

Sedgwick v. *Menck*, 1 N. B. R., 675; Cir. Ct., S. D. N. Y., 1868.

Nelson, J.: " The *filing of these bills*, according to " the law of New York, *gave a lien* upon the assets of " the debtor in behalf of the judgment creditors; and " the receiver representing their interests has, it seems, " been diligently engaged in endeavoring to reduce them " to possession and apply them to the payment of the " judgments. *It is difficult to see what right exists in* " *the assignee in bankruptcy to this property thus de-* " *voted by the law* to the payment of the debts of these " judgment creditors some ten years before any right " attached in bankruptcy. * * * *The question of* " *the right to this property is in the state court where* " *it belongs, and the decision of that court will be con-* " *clusive upon the right.* If in affirmance of the " judgment of the court below, the property will be ap- " plied to the satisfaction of the judgments on the cred- " itors' bills; if in favor of the validity of the assign- " ment, it will take the direction given under the trusts " created in the assignment. *The right to this property* " *attached long before the assignment in bankruptcy ap-* " *peared*, and before even the passage of this bankrupt " law."

Act of 1898.

The precise question— as to the lien of a creditors' bill —does not seem to have been passed upon by the Federal Courts in cases arising under the act of 1898. An analogous question—as to the lien of an attachment—has been so passed upon and in every case but one, the courts have overruled this case. Reference will be made to these authorities hereafter. But various State courts have passed upon the question of the superior lien of a creditor's bill and have uniformly followed the rule as it has been heretofore established.

Doyle v. *Heath*, 47 Atlantic Rep., 213; 4 Am. Bank. Rep., 705; Supreme Court of Rhode Island, Sept. 22, 1900.

On *Dec. 15, 1899*, the complainant commenced a judgment creditors' action. On *May 15, 1900*, judgment was entered in his favor. On *May 25, 1900*, the defendant filed his petition in bankruptcy. The trustee asked for an injunction. The Court refused to follow the reasoning of the District Court in this case, although it was cognizant of and cited it. It follows *Miller* v. *Sherry* in saying that *the lien dates from the filing of the bill*. It approves and quotes from *Taylor* v. *Taylor*, 59 N. J. Eq., 86, to the same effect. And it *holds* "that the decree of May 15, 1900, though entered with-"in four months of the filing of the petition in bank-"ruptcy by Heath, was not avoided by the adjudica-"tion in bankruptcy, inasmuch *as such decree did not* "*then create a lien* in favor of complainant, but deter-"mined that Doyle was entitled to an equitable lien on "the stock at the time of the filing of his bill."

Taylor v. *Taylor*, 59 N. J. Eq., 86, Feb., 1900: "Now, the complainant in this case had at the date of "the institution of the proceedings in bankruptcy a lien "upon the equitable property of the bankrupt—*a lien* "*which arose by the commencement of this suit* more "than four months before the bankrupt proceedings "were begun. As a general rule an equitable lien is "acquired by the filing of a creditor's bill or a bill in "the nature of a creditor's bill upon the choses in ac-"tion and equitable assets of the judgment debtor. "(Sm. Eq. Rem. Cred., p. 234, par. 220.) The ex-"istence of this lien was elaborately considered by Vice-"Chancellor Sandford in *Storm* v. *Waddell*, 2 Sandf. "Ch., 494. An assignee in bankruptcy applied to the "court of chancery for money which had been dis-"covered by means of creditors' bills against several "bankrupt judgment creditors. The statute under "which the bill was filed was similar to ours. It was "held that the right acquired by the creditor was a lien "upon the things in action which the creditor had at

" the time of the commencement of the suit. The same " was held in *Fetter & Co. v. Ciroda, et al.*, 4 B. Mon., " 482, where suit was brought by judgment creditors to " set aside fraudulent conveyances, and in *Watkins v. " Pinkney*, 3 Edw. Ch., 533, upon motion to attach " defendant in creditor suit for discovery for not as- " signing his property to the receiver appointed in the " suit, and who set up that since the filing of the cred- " itor's bill he had made application for the benefit of " the bankrupt law. To the same purport are the fol- " lowing cases: *Sedgwick v. Menck*, 6 Blatch., 156; " *Johnson v. Rogers*, 15 Bankr. Reg., 1; *In re Hinds*, " 3 Bankr. Reg., 351; *Stewart v. Isador*, 1 Bankr. Reg., " 485; *Carr v. Fearington*, 63 N. C., 560;" citing also *Bank v. Shuler*, 153 N. Y., 163; *Corning v. White*, 2 Paige, 567; *McDermutt v. Strong*, 4 Johns. Ch., 687; *Miller v. Sherry*, 69 U. S., 237. " As against " any one but a *bona fide* purchaser for value, *it* " *is settled by the overwhelming weight of author-* " *ity* that *upon filing a bill* and issuing a subpœna " *the judgment creditor acquires a lien* which becomes " specific when property of the debtor is discovered. *It* " *is entirely settled that a trustee* or assignee *in bank-* " *ruptcy takes the property of the bankrupt subject to* " *all equitable liens.*"

Iselin v. Goldstein, 35 Misc. Rep., 189 N. Y. (July, 1901): " The *subsequent proceedings in bankruptcy* " *cannot affect the equitable lien acquired by the com-* " *mencement of this action* long before the passage of " the bankrupt act. (Freedman's Saving & T. Com- " pany *v.* Earle, 110 U. S., 710, 716; Edmeston *v.* Lyde, " 1 Paige, 637; First National Bank *v.* Shuler, 153 " N. Y., 163.) The trustee in bankruptcy took only " the residuum which the debtor had on the third day " of June, 1899, this action having been begun long " before. The judgment debtor could not by proceed- " ings in bankruptcy further his scheme in any manner " by destroying the equitable lien obtained by his cred- " itors through the commencement of this action."

In *Bank* v. *Katz*, 1 Am. Bank. Rep., 19, and *Reid* v. *Cross*, 1 Am. Bank. Rep., 34, both considering the Act of 1898 in the Illinois Courts, it was *held* that the complainant had, by filing his bill to reach equitable assets acquired a lien superior to that of a trustee in bankruptcy and a stay was refused.

The State Courts.

The decisions of the Courts of New York—passing by those of any other State—have been uniformly in support of the petitioners' position. The leading case,

Storm v. *Waddell*, 2 Sandf. Ch., 494,

is precisely in point. In that case the Court refused to recognize the position taken by the District Court in *Ex parte Waddell*, 1 N. Y. Leg. Obs., 53, which was similar to that assumed in this case. The theory of the lien is elaborately discussed with a very extensive examination and citation of authorities and the case has been continually cited as authority in the Federal and State courts. So far as we are aware, its authority has never been seriously questioned.

In *Storm* v. *Waddell* no judgment had been entered prior to the bankruptcy proceedings. The reasoning rests entirely upon the situation as it was created by the commencement of the action. The Court say (p. 514), that "the right thus acquired by the creditor, is a "*charge* upon the things in action which the debtor had "at the commencement of the suit. *It is so far contin-* "*gent that it may possibly be defeated by the event of the* "*suit, although in this respect, the result is unmeasur-* "*ably more certain than in the suits by attachment* in "our sister states for the collection of ordinary debts. "And except on this contingency, *it is an absolute claim,* "*to be divested only on satisfaction of the debt and the* "*costs of the suit. It is just as certain and effectual* "*upon the effects discovered, as a mortgage or judg-* "*ment is upon the lands* thereby incumbered." And again (p. 532), "the commencement of the creditor's

" suit gave them an equitable lien upon the mortgage in " question, *which is as efficacious as the levy of an execu-* " *tion upon merchandise*" * * * (p. 505). "His " procuring a discharge in bankruptcy, would have no " effect whatever upon the right which Chester & Co. " acquired by their creditor's suit. It was *the property* " of the judgment debtor, not a new judgment against " him, which they sought by their bill. If they failed " in discovering property, their suit would fail. Thus " their proceeding was against the special effects, not " the person of Glover; and if available, would become " so by force of the discovery of such effects existing " at the time of filing their bill. On such effects, " *they obtained a vested right for payment, and a subse-* " *quent discharge of their debt by operation of law,* " *could not divest that right.*"

In *Lynch* v. *Johnson*, 48 N. Y., 27, the Court say that the commencement of the suit is to be regarded as " *an actual levy upon the equitable assets of the debtor*," and " this lien was rendered effectual by the final order " of the judge," and payment, or a liability to pay, in pursuance of that order is a defense to an action brought by any claimant acquiring a right subsequent to the commencement of the suit.

First Nat'l Bank v. *Shuler*, 153 N. Y., 163, 171: "*The* " *rule is well settled in this state* that the plaintiff in " a creditor's action acquires, *by the commencement of* " *the suit, a lien* upon the choses in action and equitable " assets of the debtor, which entitles him, in the suc- " cessful event of the action, to priority of payment " thereout in preference to other creditors, irrespective " of the priority of the respective judgments."

Roberts v. *Albany & West Stockbridge R. R. Co.*, 25 Barb., 662: " *As soon as the judgment creditor's suit* " *was instituted*, the plaintiff in that suit *obtained a* " *lien* on all the choses in action of Rutter. All the " title he had was subject to that lien; all that he could " pass was subject to it." * * * "*In contempla-*

" tion of law the title vested in the court when the ac-
" tion was commenced, and passed as from that date, to
" the receiver."

Jeffres Recr. v. *Cochrane*, 47 Barb., 557: "*By the* " *commencement of that action* the plaintiff acquired " *a lien* upon it. * * * If he succeeded, as he " afterwards did, the *lien created by the commencement* " *of the action would relate back to the time when the* " *action was commenced, and overreach the title of the* " *present defendant.*"

Utica Ins. Co. v. *Power*, 3 Paige, 365: "If that " suit was commenced, as I think it must have been, " before the assignment to the register, *the complain-* " *ants had acquired a specific lien* on this demand as " the property of Lynch; and they are entitled to hold it " for the satisfaction of their judgment, as against the " assignee, independent of the question of set-off."

Macy v. *Jordan*, 2 Denio, 570; Ct. of Errors, 1845. The lien upon a debtor's property and rights in action created by creditors' bill is not divested by a subsequent discharge in bankruptcy.

McDermutt v. *Strong*, 4 John Ch., 687, *Kent*, C.: "If they had a right to it as judgment creditors, by hav- " ing sued out execution at law, and having filed their " bill before any other judgment creditors had done " either, *that right could not be affected by a subsequent* " *assignment of that equity* by the debtor. And whether " that subsequent assignment was for the benefit of the " creditors in general, as it was in this case, or for the " benefit of some individual creditor, cannot alter the " application of the principle."

Smith v. ———, 4 Edw. Ch., 653. "A judgment " creditor, having acquired this equitable lien, *cannot* " *be divested of it by the debtor's subsequent proceed-* " *ings in bankruptcy.*"

Manderille v. *Campbell*, 45 App. Div., 512 (1899): "The effect of these cases is to compel a creditor who " wishes to take advantage of this statute to begin the " usual action in the nature of a creditor's action for the

" purpose of acquiring a lien upon property which he " seeks to reach. That *lien is created* only *by the com-* " *mencement of the action,* and if the subject of the " action is real estate, by the filing of a *lis pendens* and " the service of a complaint (*Edmoston* v. *McLoud,* " 16 N. Y., 543). When a creditor has taken that step, " he has made, as is said by Justice Swayne in *Miller* v. " *Sherry,* 2 Wall., 237, 249), 'an equitable levy' and " *he has obtained a specific lien* upon the property upon " which the equitable levy is made (*Storm* v. *Waddell,* " 2 Sandf., Ch. 494)."

There are a number of other decisions to the same effect, but to accumulate them would add little to the weight of those already cited.

II. *The lien is property and its existence does not depend upon a subsequent judgment.*

In *Haebler* v. *Myers,* 132 N. Y., 363, an action was brought by an attaching creditor whose attachment had been vacated and then restored, to recover moneys paid over by the Sheriff to a subsequent attachment creditor. The Court say: " The right of the plaintiffs " to recover could hardly be questioned if the money " had subsequently belonged to them when it was paid " by the sheriff to the defendants, but inasmuch as they " only had a lien upon it and had not then completed " their title, it is claimed that no action will lie for their " relief. In taking this position the defendants lose " sight of the fact *that a lien is property* in the broad " sense of that word, and although it has no physical ex- " istence *it exists by operation of law so effectively as to* " *have pecuniary value,* and to be capable of being " bought and sold. *They also ignore the proceedings* " *that were in progress to convert the lien into a title to* " *the fund.*"

The argument on the point that the lien is not contingent on a subsequent judgment can be stated no bet-

ter than by quoting the remarks of Mr. Chief Justice Parker in the very carefully considered case of

Kittredge v. *Warren*, 14 N. H., 509. He is there considering the status of an attachment lien under the Act of 1841, which, as the court in *Storm* v. *Waddell*, *supra*, say, is inferior to that of a creditor's bill. In the case of an attachment the creditors claim is not yet established. In the case of a creditor's suit, the fact of its establishment is the foundation of the suit. The argument is thus more than applicable here.

(p. 514) "Even if Congress, by the authority to pass "bankrupt laws, may be supposed to possess the power to "abrogate and annul vested rights of that character" (mortgages, pledges, particular liens and other securities held by creditors), "fairly acquired before any "act of bankruptcy, and before the passage of the "act itself; it would be somewhat remarkable, should "an attempt be made to carry such a power into execu- "tion, for the sake of an equal distribution of the "property among creditors who had not exercised equal "care and diligence; and it *would be most astonish- "ing if a provision should be made, by which such "rights might be defeated, at any time, at the pleas- "ure of the insolvent debtor, merely by filing his pe- "tition in bankruptcy.* * * * (p. 530) If this "lien or security were contingent or conditional, it is "not perceived why that should take it out of the ex- "press language of the proviso, which includes all "liens and securities, valid by the laws of the state. "The fact that it is dependent upon, and may be de- "feated by a contingency, does not make it any the "less a lien or security, so long as it exists. But the "existence of the lien or security is, in our view, in no "way contingent, conditional, or inchoate. *Its ex- "istence does not depend upon the judgment. It ex- "ists, in its full force, from the moment the attachment "is made:* as much so as a lien by judgment, upon "the rendition of the judgment, in the states where "that security is recognized. As we have already "seen, it fastens itself upon, and binds the property at

" once, giving priority of right. * * It is originated
" by the suit, and sustained by the suit, but is not part
" of it. *It can only be made available through a judg-*
" *ment, but the judgment neither changes its nature*
" *nor determines its validity; nor does it operate to per-*
" *fect the attachment.* The judgment establishes the
" existence of the demand upon which the attachment
" is predicated, and the security taken; whereas it was
" before only alleged, and presupposed, for the purpose
" of the security. *The security is not inchoate but*
" *it is conditional in the sense that liens by judgment*
" *are conditional.* It depends upon contingencies
" whether it will ever be made available to the creditor,
" and *so it is with liens by judgment, where there is*
" *a period when they cease to exist, if the judgment*
" *creditor has not proceeded to seize the property.* The
" continuance of a lien by attachment depends upon one
" contingency beyond liens by judgment, which is, that
" the plaintiff sustains his suit; but the fact that the
" law authorizes it to be fastened upon the property,
" *in invitum*, before the existence of the demand is
" admitted, or ascertained, and that it may be defeated
" and dissolved if it shall appear that the plaintiff has
" no claim, neither disproves its existence as a security
" before the demand is ascertained, nor shows that it
" did not confer vested rights from the moment it
" was taken. *A pledge to secure all demands which*
" *may be due from the pawner to the pawnee, is not*
" *the less a pledge, or the lien less perfect, because*
" *it may appear, upon an accounting, that nothing*
" *is in fact due. And an accounting, by which the*
" *pawner is found indebted in a certain sum, has*
" *no operation to perfect the pledge, although it as-*
" *certains the amount for which it stands as a secur-*
" *ity. Nor does the expiration of the day of payment,*
" *by which the pawnee obtains a right to sell the pledge*
" *and apply the proceeds in satisfaction of his demand,*
" *perfect the security, although it gives an absolute*
" *right to sell the pledge, which did not exist before.*
" Whether any lien will be available to the party en-
" titled to it, is usually a contingent matter, depend-

"ent upon his pursuing the regular steps to enforce it. "We cannot restrict the signification and meaning of "the term 'liens' or the term 'securities' by any argu- "ment drawn from the company in which they are "found. The maxim, *noscitur a sociis,* cannot be ap- "plied here with that purpose, for much of the argu- "ment which must be founded upon it would restrict "'liens' to such as arise from contract alone, resting "on possession. But this would prove quite too much, "it being clear and well settled that this term has here "a much broader meaning. And if these terms are "applicable to securities obtained by the creditor "through judicial or legal process, the course of argu- "ment that makes a subdivision in the securities of "that character, excluding those dependent upon "remedial *mesne* process, seems to find nothing in their "company upon which to base an exclusion of that "description. * * (p. 535.) *The attachment, or "lien, or security, is not constituted by the judgment; "its validity is not dependent upon the judgment; it is "not perfected by the judgment; nor is it enlarged or "changed by the judgment.* But it is, before judg- "ment a fixed and positive security for what may be "recovered, by means of which the plaintiff, at his "election, may hold the property, and obtain a prefer- "ence of satisfaction, provided he obtain a judgment, "and provided he proceed to levy his execution with- "in the limited time, and provided he complete the levy "according to law."

Similarly in *Haughton* v. *Eustis,* 5 Law Rep., 505, Fed. Cas., 6224, Judge Thompson says: "As to the "argument, that the rights or security upon property "attached, is contingent, and depends upon a course "of judicial proceeding to render it perfect and abso- "lute, it is sufficient to remark, that *it is no more "contingent than a lien by mortgage. That is in its "very nature defeasible. So, in fact, is the common "law lien. Defeasibility, contingency, necessarily en- "ter into the idea of a lien, for the moment the right "becomes absolute, it ceases to be a lien.* In case of

" mortgage, a course of judicial proceeding is as neces-
" sary to render absolute the right and title to the prop-
" erty, as in case of attachment."

III. *The argument of the District Court is based upon authorities which have been long since overruled.*

The position which the District Court seeks to maintain is not a new one. It arose and was earnestly considered under the Act of 1841 and was determined adversely to the assignee in bankruptcy.

Its opinion is based upon *Ex parte Foster*, 2 Story, 131. For each of the only other cases which tend to sustain the reasoning cited in the opinion (Smith v Gordon, 2 N. Y., Leg. Obs., 325, 22 Fed. Cas., 554, and *Ex parte* Waddell, 1 Leg. Obs., 53, are also dependent on it.

In that case, arising under the act of 1841, Mr. Justice Story, concluded that lien of an attachment was inchoate only and dependent upon a favorable judgment, *because the claim upon which it was based had not been made absolute*; that a discharge in bankruptcy would be a bar to the judgment, and he therefore enjoined the entry of a judgment. Subsequently in *Parker* v. *Muggridge*, 2 Story, 334, he distinguishes the *Foster* case. The *Parker* case was also a case of attachment lien, but the defendants had suffered default, the amount due had been admitted *and thus become fixed*. The defendants were estopped to say they had any defense and could not therefore plead a discharge in bankruptcy as a bar. *As the lien thus became absolute, the entry of judgment was permitted. The plaintiffs were adjudged to hold an equitable lien which the District Court sitting in bankruptcy should uphold.*

See also *Fiske* v. *Hunt*, 2 Story, 582.

Mr. Justice Story's reasoning is wholly based upon the fact that the plaintiff's claim is itself inchoate. If the claim is admitted or fixed, the lien is perfect. No question of possession is involved, for, as Mr. Justice Story points out, an equitable lien does not depend upon possession. In a creditor's suit, however, there is constructive possession.

The case of a creditor's bill, even upon Mr. Justice Story's reasoning, is quite different from that of an attachment lien. The creditor's claim is well established. A discharge in bankruptcy cannot be pleaded as a bar to a judgment. The bankrupt is not the real party. The real parties are those in possession of his property. The creditor's claim has been established by the judgment and execution upon which the bill is based. The only question in a creditor's suit is whether the property sought to be used for the satisfaction of the judment at law is that of the judgment debtor. The creditor is seeking merely to enforce the judgment and execution. As the Court say in *Freedman's Savings & Trust Co.* v. *Earle*, 110 U. S., 710, "It is the *execution* first begun to be executed which is entitled to priority. The filing of the bill, in cases *of equitable execution*, is the beginning of executing it." And the District Court for the Northern District of New York so held within five months after the decision of the *Foster* case.

Ex parte General Assignee, supra.

But Mr. Justice Story's action in the *Foster* case was not followed in other jurisdictions. The Courts almost unanimously recognized the validity of the attachment lien and allowed the entry of judgment on it subsequent to an adjudication of the debtor's bankruptcy. The execution of the judgment was, however, properly limited to the attached property.

Kittredge v. *Warren*, 14 N. H., 509.
Haughton v. *Eustis*, Fed. Cas., 6224.
Davenport* v. *Tilton, 10 Met., 320.
Franklin Bk.* v. *Bachelder, 23 Maine, 60.

Bates v. *Tappan*, 99 Mass., 376.
Bowman v. *Harding*, 56 Maine, 559.
Leighton v. *Kelsey*, 57 Maine, 85.
Stoddard v. *Locke*, 43 Vt., 574.
Daggett v. *Cook*, 37 Conn., 344.

Nearly all of these cases are cited with approval in *Doe* v. *Childress*, 21 Wall., 642, where it is said: "Ac- " cordingly, it has been held many times in the various " courts of the country, that *as to the class of attach-* " *ments not within the four months' limitation, the bank-* " *ruptcy proceedings do not work their dissolution*; that " the debtor's title passes to the assignee, subject to the " creditor's lien acquired by virtue of the attachment, " and that a judgment to be enforced against the prop- " erty attached, but not against the person of the debtor " or any other property, may be entered, although a dis- " charge has been granted, and is pleaded in bar of the " action. * * * *We think this is a sound exposi-* " *tion of the Statute.*"

This decision is quoted and approved in

Davis v. *Friedlander*, 104 U. S., 570.

Under the present bankrupt act, the Courts have also held an attachment lien valid where it was levied more than four months prior to the filing of a petition in bankruptcy, although judgment was not entered until within the prescribed period. They have with one exception (*In re* Johnson, 108 Fed. Rep., 373) refused to follow the reasoning of the District Court or the authority of its decision.

In re Blair, 108 Fed. Rep., 529, Dist. Ct. Mass. (1901), *Lowell, D. J.*: " Now, an attachment, in and of " itself, and without further proceedings, creates a lien " in Massachusetts. This has been decided by the " supreme court of the United States in *Peck* v. *Jen-* " *ness*, 7 How., 612. With this decision agrees that of " the supreme court of Massachusetts in *Davenport* v. " *Tilton*, 10 Mete., 320; and, if it be possible that these " concurrent decisions leave a doubt in the matter, that

"doubt is resolved by the present bankrupt act, *which* "*itself speaks of attachments as liens.* * * * * "Where, however, the lien is created by the attachment, "*the judgment and levy create no new or additional* "*lien, but only enforce a lien already existing.* * * * "The meaning of the subsection appears to be this: "Under some circumstances, all liens obtained through "legal proceedings are avoided, in whatever part of the "suit or by whatever form of proceeding they are "created. If the lien is created by the levy, then the "lien of the levy is avoided; if created by the judgment, "then the lien of the judgment is avoided; if created "by the attachment, then the lien of the attachment is "avoided; but, *if the lien created by the attachment is* "*saved, that lien may be enforced by appropriate pro-* "*ceedings, even though such proceedings include a* "*judgment and levy made within the limited time.* I "am aware that this decision is in substantial conflict "with *In re Lesser*, 108 Fed., 201. With the utmost "respect for the learned and distinguished judge who "decided that case, I find myself unable to agree with 'him."

The opinion then refers to the opinion of the Circuit Court of Appeals in this case which was withdrawn when the case was certified to this Court.

The case of *In re Beaver Coal Co.*, 110 Fed. Rep., 630, follows *In re Blair* and declines to follow the District Court in this case.

The case of *Coal Co.* v. *Goodwin*, 95 Me., 246, also follows *Bowman* v. *Harding*, 56 Me., 559, and *Leighton* v. *Kelsey*, 57 Me., 85, above cited, and allows the entry of a judgment within the limited time enforceable only out of the attached property.

The cases of *Smith* v. *Gordon*, 2 N. Y. Leg. Obs., 325, and *Ex parte Waddell*, 1 Leg. Obs., 53, cited by the District Court, both rely upon *Ex parte Foster*, and their authority is limited by it. The former was de-

cided in Maine and needs no consideration. The latter was decided in the Southern District of New York and is in conflict with *Ex parte General Assignee, supra,* decided in the Northern District about the same time. It held that the filing of a creditor's bill created no lien superior to the rights of an assignee in bankruptcy, but the Court sent the assignee for the maintenance of his claim to the State Chancery Court. The assignee did apply to the Chancery Court to receive the funds discovered and secured in the judgment creditor's suits, but his application was there denied. His rights were examined at great length in

> *Storm* v. *Waddell,* 2 Sandf. Ch., 494, before cited,

where the Court reviewed all the authorities and reached an opposite conclusion from that of Judge Betts. The case is a leading one and has been continually followed and cited as authority, and since the time of its decision the question has not, so far as we are aware, been open to discussion. The present decision of the District Court is the first attempt to open it.

The case of *Edmonston* v. *McLoud,* 16 N. Y., 543, cited by the District Court as authority for its position, holds merely that the lien acquired by a creditor's bill does not relate back to earlier supplementary proceedings which had been abandoned, and that the two proceedings have no relation to each other.

The District Court seems to think that because the action in which the lien is procured may be abandoned, the lien has never been brought into actual existence. But any lien may be abandoned or lose its validity through lapse of time. It is not for that reason any the less a lien. That is true in the State of New York of a real estate mortgage after twenty years, or a chattel mortgage in one year, if not refiled, or a judgment on real estate in ten years, or an execution if a levy be not made or it be allowed to become stale (*Hathaway* v. *Howell,* 54 N. Y., 97). We doubt if the

Court would presume to say that these liens are inchoate until actually executed.

IV.—The Trustee takes the title subject to all equities, liens, or encumbrances, whether created by operation of law or by act of the bankrupt.

The Trustee represents simply the bankrupt and can take no rights which they did not have.

Yeatman v. *Savings Institution*, 95 U. S., 764.
Stewart v. *Platt*, 101 U. S., 731.

III.

The judgment in the creditors' action is not brought within the terms of Section 67f of the Bankruptcy Act.

Even if the petitioners lien were inchoate and depended upon the recovery of a judgment in the creditors' action, the lien was in fact perfected. This is so on three grounds:

1. The judgment of the Special Term of the State Court established the petitioners' rights more than a year before the filing of the petition in bankruptcy.

2. The judgment of the Appellate Division of the State Court was *obtained* more than four months prior to the filing of the petition in bankruptcy.

3. A judgment in a judgment creditor's action, whenever obtained, is not one avoided by the bankrupt act.

I.—*The judgment of the Special Term of the State Court on the 11th day of April, 1898, awarded the pe-*

titioners a complete judgment against the bankrupt and their transferees.

It adjudged that all the transfers were fraudulent and void as to the petitioners (Record, p. 2). It also adjudged that they were fraudulent and void as to the Receivers. As between the Receivers and the petitioners, the Court held that it should retain jurisdiction for the purpose of vesting title in the receivers and distributing the assets to the general creditors. *There was, therefore, as to the bankrupts and their transferees, a full and complete judgment in favor of the petitioners.* It was this earlier judgment, which is indisputably not within the four months' limitation, which fixed the petitioners' rights and therefore made certain the lien acquired by the commencement of the action.

The Appellate Division also held that the same transfers and conveyances were fraudulent and void as to the petitioners. They held further that whether they were or not so fraudulent and void as to the receivers, the receivers could not have any relief in that action. They also held that the receivership itself was fraudulent as to the petitioners, and they consequently gave the petitioners full relief as to the equitable assets in the receivers' hands.

The Trustee in Bankruptcy is in no position to claim that this judgment was the first judgment that gave the plaintiffs any relief. Upon this application he can only claim through the bankrupts (*Stewart* v. *Platt*, 101 U. S., 731; *Storm* v. *Waddell*, 2 Sand. Ch., 494), and they have been defeated from the commencement of the litigation. He may maintain an action to have the same transfers adjudged fraudulent as to him, although the bankrupts could not do so. But that is not his position here. Here he stands in the shoes of the bankrupts and must maintain that *they* were entitled to successfully defend the action, that the judgment of the Court never has been rendered, more than four months prior to the filing of the petition in bankruptcy, that their transfers were fraudulent and void. For, under the doctrine which the District Court seeks to maintain, the moment the fraud is established and the transfers made void by a judgment to that effect, the petitioners' right becomes fixed. The

bankrupts' defense is disposed of. The lien ceases to be inchoate and becomes absolute. The fact that the Court takes possession of the property for another purpose is immaterial from the point of view of the bankrupts and their trustee.

II.—*The judgment of the Appellate Division was obtained more than four months prior to the filing of the petition in bankruptcy.*

The judgment of the Appellate Division, which the District Court holds was the first effectual one, was in fact *obtained* or *rendered* on the 30th day of December, 1898, *four months and thirteen days before the filing of the petition in bankruptcy.* It is entitled an order, but it is the only paper which is signed by that Court, or which is kept in its records. A subsequent formal judgment is entered by the Clerk of the Supreme Court upon a certified copy of it transmitted from the Clerk of the Appellate Division. Its language is that "it is ordered and *adjudged*." The subsequent formal judgment follows its verbiage in all respects. (Record, p. 3.)

This paper is, we submit, a "judgment" within the meaning of §67f of the Bankrupt Act. That section reads:

"That all levies, judgments, attachments, or other "liens, *obtained* through legal proceedings against a "person who is insolvent, at any time within four "months prior to the filing of a petition in bankruptcy "against him, shall be deemed null and void in case he "is adjudged a bankrupt."

This is equivalent to an enactment that where the judgment is obtained more than four months before the filing of the petition, it shall remain in force.

Doe v. *Childress*, 21 Wall., 642.

The judgment in question was in fact *obtained* at least as early as the 30th day of December, 1898. It was not formally entered in the clerk's office—owing

to the delay occasioned by motions for reargument—until the 31st of January, 1899 (Record, p. 3). But that fact does not make it any the less a judgment "obtained" prior to the limited time.

Black on Judgments, §106:

"*The rendition of a judgment is the judicial act of* "*the court in* pronouncing the sentence of the law upon "the facts in controversy as ascertained by the pleadings and the verdict. *The entry of a judgment is a* "*ministerial act*, which consists in spreading upon the "record a statement of the final conclusion reached by "the court in the matter, thus furnishing external and "incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. "*It is the former, therefore, that is the effective result* "*of the litigation. In the nature of things, a judgment* "*must be rendered before it can be entered. And* "*not only that, but though the judgment be not entered* "*at all, still it is none the less a judgment.* The omission to enter it does not destroy it, nor does its vitality "remain in abeyance until it is put upon the record."

§110. "When a judgment has been rendered in a "cause, it becomes the duty of the clerk, according to "the usual practice, to make a record entry of it in an "official book kept for that purpose. * * * But, as "was stated in the beginning of this chapter, this proceeding is ministerial only, and is not essential to the "validity of the judgment itself. It is none the less the "judgment of the court because not entered by the "clerk."

§115. "It may therefore be stated as the modern rule "that the *form* of the judgment is not very material, provided that in substance it shows distinctly and not inferentially that the matter had been determined in "favor of one of the litigants, or that the rights of the "parties in litigation had been adjudicated."

Freeman on Judgments, §38.
Fish* v. *Emerson, 44 N. Y., 376.
Stephens* v. *Santee, 49 N. Y., 35.
Bradner* v. *Howard, 75 N. Y., 417.

Cooly v. *Patterson*, 52 Maine, 472.
Huntress v. *Hurd*, 72 Maine, 450.
Davis v. *Smith*, 79 Maine, 351.
Young v. *Dearborn*, 27 N. H., 324.
In re Newman, 75 Cal., 213.
Crim v. *Kessing*, 89 Cal., 478.

III.—*A judgment in a judgment creditor's action, whenever obtained, is not one avoided by the bankrupt act.*

Section 67f speaks of judgments obtained "*against* " *a person who is insolvent* * * * in case he is ad- " judged a bankrupt." The bankrupts are, it is true, parties to all creditors' actions. But the principal parties in such actions are the fraudulent transferees. It is they who are attacked, and it is the property in their possession which is sought to be recovered. There is no warrant in the section for avoiding a judgment against them. *The transferees are not persons against whom a petition has been filed.* The judgment is in effect one *in rem* and not against any *person*. It simply forecloses the rights of all claimants to the property affected by the action and subjects it to the payment of the creditor's adjudged claim. (*Storm* v. *Waddell*, 2 Sandf. Ch., 494.) What the section evidently contemplates is a money judgment against the bankrupt on which an execution may be levied on his property which will prevent the trustee from taking possession of it. But the money judgment in this case was entered nearly three years before the adjudication in bankruptcy. And there is no property of which the trustee can take possession. It is all claimed by other persons.

This was been so decided in two cases arising under the Act of 1898.

Doyle v. *Heath*, 47 Atl. Rep., 213; 4 Am. Bank. Rep., 705, Supreme Court of Rhode Island, Sep., 1900.

That Court holds that the *judgment* is not rendered void by §67f but only the lien created by the judgment. It also holds, as we have already shown *supra*, that the judgment in a creditor's action does not create a lien—the lien is created by the filing of the bill, and it quotes and approves

In re Kavanaugh, 99 Fed. Rep., 928, which says: "It appears to us to be evident that the language (of "§67f), properly construed, *was intended only to apply "to such judgments as of themselves created liens.* "* * * It seems to us that *a clear distinction "should be drawn between a judgment*, in this sense, "*upon a debt*,—a mere personal liability,—*and a decree* "of the chancellor *declaring the property rights of "parties* in a case like the one before us, *but which in "no way created a lien.* Particularly is this true, as "the action in the state court was brought upon a "judgment *in personam* obtained long before, and upon "which there had first been an execution and return of "*nulla bona. This was therefore an ancillary proceed-"ing in equity for the enforcement of a judgment at "law.*"

IV.

The petitioners' right is a property right (Haebler *v.* Myers, 132 N. Y., 363) vested long before the passage of the bankrupt law. Whether Congress may or may not constitutionally interfere with it under the provisions of the Constitution relating to the passage of bankrupt laws and in the face of the Fifth amendment, we shall not now stop to discuss. The petitioners' position is, we submit, plainly not affected by the act which Congress has passed. For, in the words of the Vice-Chancellor, in *Storm v. Waddell* (p. 504), "there is nothing in the "act which authorizes the inference that Congress in-"tended to give such a monstrous and unprecedented ef-"fect to it, as to take away rights, vested or acquired in

"good faith; whether they were legal or equitable ex-
"press liens, or constructive trusts."

We have already cited the remarks of Mr. Chief Justice Parker in *Kittredge* v. *Warren* to the same effect.

V.

The questions certified should be answered as follows:

The first and second in the negative.

The third in the affirmative.

If the Court should decide that the lien acquired by the creditors' action was inchoate merely, the fourth question should be answered in the affirmative and the fifth in the negative. The essential propositions of the fourth and fifth questions should be answered in the affirmative and negative respectively.

NELSON S. SPENCER,
Of Counsel for the Petitioners.

No. 592.

FILED
APR 10 1901
JAMES H. McKENNEY,
Clerk

In the Supreme Court of the United States.

Affidavit & Notice of Motion

METCALF BROTHERS & CO.,
Petitioners,

against

BENJAMIN BARKER,
Trustee.

Filed April 10, 1901.

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OCTOBER TERM 1900.

AFFIDAVIT AND NOTICE OF MOTION TO ADVANCE THE ARGUMENT ON THE QUESTIONS OF LAW CERTIFIED BY THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

NELSON S. SPENCER.
of Counsel for Petitioners.

LIVINGSTON MIDDLEDITCH CO., 85 DUANE ST., N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

METCALF BROTHERS & CO.,
Petitioners

AGAINST

BENJAMIN BARKER,
Trustee

SIRS:

Please take notice that upon the petition of Metcalf Brothers & Company, hereto annexed, and upon the questions of law certified to the Supreme Court of the United States by the Circuit Court of Appeals for the Second Circuit asking for instruction for its decision upon the petition of Metcalf Brothers & Co. to that court to superintend and revise in matter of law an order of the District Court of the United States for the Southern District of New York made in the matter of Lesser Brothers, bankrupts, we will apply to the Supreme Court of the United States, at a session thereof to be held at the Capitol, in the City of Washington, District of Columbia, on Monday, the 15th day of April, 1901, at the opening of Court on said day, or as soon thereafter as counsel can be heard, for an order advancing the argument to be had upon said certified questions and directing that the argument upon such questions be taken up out of its order upon the docket

and be set down for a particular day, and for such other and further relief as to the Court may seem proper.

Dated, New York, April 3d, 1901.

Yours, &c.,

STICKNEY, SPENCER & ORDWAY,
Solicitors for Metcalf Bros. & Co., Petitioners,
Office and Post Office Address,
No. 31 Nassau Street,
New York City.

To

Messrs. Anderson & Anderson,
Solicitors for Benjamin Barker, Esq., Trustee.

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1900.

Metcalf Brothers & Co.,
Petitioners
against
Benjamin Barker,
Trustee

To the Judges of the Supreme Court of the United States:

Your petitioners, Manton B. Metcalf, Stephen O. Metcalf, Jesse H. Metcalf and Edwin R. Dillingham, composing the firm of Metcalf Brothers & Company, respectfully show:

First.—Your petitioners were, and still are, co-partners engaged in business in the City of New York.

under the firm name of Metcalf Brothers & Company. On or about the 2d day of October, 1896, Tobias Lesser, Israel Lesser and Simon Lesser, being copartners engaged in business in the City of New York under the firm name of Lesser Brothers, made a number of transfers, conveyances, assignments and other acts, whereby they sought to dispose of all of their property in fraud of their creditors. Among other things, they procured the fraudulent appointment of one Morris Moses as Receiver of their copartnership property.

Your petitioners on the 22d and 29th days of October, 1896, respectively, recovered certain money judgments against the said Lesser Brothers in the courts of the State of New York, and thereafter, and on the 18th day of December, 1896, commenced an action in the Supreme Court of the State of New York to set aside the judgments, transfers, conveyances, assignments and other acts done by the Lessers in fraud of their creditors, including the said fraudulent receivership. This action came to trial in the said Supreme Court of the State of New York, and on the 11th day of April, 1898, a final judgment was entered in that action adjudging that all the acts, instruments and proceedings done by Lesser Brothers were fraudulent and void as against your petitioners.

Subsequently appeals were taken from said judgment to the Appellate Division of said Supreme Court, and thereafter to the Court of Appeals of the State of New York. Appeals were so taken both by the plaintiffs and by the defendants. On the 6th day of February, 1900, the said Court of Appeals affirmed the judgment of the Special Term of the Supreme Court adjudging the acts, instruments and proceedings of Lesser Brothers fraudulent and void, and awarded to your petitioners the entire relief for which they had asked in the complaint in their equity action.

In the meantime, and in November, 1896, certain other creditors of Lesser Brothers had applied to have

removed the Receiver which Lesser Brothers had procured to be fraudulently appointed, and the Court, upon that application, though not removing him, had associated with him another Receiver of its own selection. These two Receivers had become possessed of certain of the property of Lesser Brothers, and out of the proceeds of the sale of that property in their hands, they were directed by the judgment in your petitioners' equity action, to satisfy the amount of the money judgments procured by your petitioners upon which the equity action was based.

Second.—Pending the appeal to the Court of Appeals of the State of New York in your petitioners' equity action, the said Lessers on May 12th, 1899, were adjudged bankrupts, on their own petition, in the United States District Court for the Southern District of New York. On June 7, 1899, Benjamin Barker was elected Trustee of said bankrupts. After the decision of said Court of Appeals, and on the 29th of March, 1900, the said District Court, upon the application of the said Trustee, made an order enjoining your petitioners from collecting under or by virtue of the said judgment in their equity action any money or property from the Receivers of said Lesser Brothers, or otherwise.

Your petitioners being aggrieved by said order, presented a petition to the Circuit Court of Appeals of the United States for the Second Circuit, to superintend and revise in matter of law the said order of the District Court of the United States. Upon the argument had upon said petition before said Circuit Court of Appeals for the Second Circuit, the said Court certified to this Court certain questions of law concerning which it desires the instruction of this Court for its proper decision. The said certificate was filed in the office of the Clerk of this Court and the case docketed on or or about the 11th day of March, 1901.

Third.—Your petitioners now pray for an order of

this Court advancing the argument to be had upon said certificate, and directing that the argument upon said certificate be taken up out of its order on the docket, and be set down for a particular day. The reasons for the prayer of your petitioners and the special and peculiar circumstances which exist therefor are as follows:

1. This matter will not be regularly reached for argument, as your petitioners are informed, until the spring of 1902. The proceedings instituted by your petitioners to collect their money judgments of October, 1896, have already been pending nearly five years, of which one has already been consumed in the United States courts in proceedings instituted after they had procured an absolute direction for immediate payment out of funds in the possession of the courts of the State of New York. The expense to your petitioners in the United States courts has already been great and, if successful, they have no hope of reimbursement, as there are, as they are informed, no assets in the hands of the trustee. For the delay entailed by the submission to this court of the questions involved they will receive no compensation.

2. But a still more important fact is that the courts of the State of New York and of the United States for the Southern District of New York are dependent upon the decision of this court for the proper administration of the assets of said bankrupts. A large amount of litigation and the collection, administration and proper distribution of the property of Lesser Brothers is substantially at a standstill and cannot proceed until this court has passed upon the questions of law submitted to it. The delay involved in allowing the argument on these questions to await its order on the calendar affects a large number of persons and is extremely detrimental to their interests. To make this plain, it is necessary to refer briefly to the situation of the bankrupts' estate at the present time.

Lesser Brothers, the bankrupts, were possessed at the time of making the transfers in question only of certain goods and merchandise used in the conduct of their business, and of certain outstanding accounts. They tried to place the goods and merchandise in the hands of certain favored persons who were, as they said, their creditors, by means of confessions of judgment made by them in favor of these alleged creditors. These confessions of judgment and the executions issued thereon were set aside by the judgment in your petitioners' equity action. But while that action was pending the Receivers to which reference has been made, by virtue of an order of the Supreme Court of New York, had been directed to take the merchandise into their possession, to sell it and to hold the proceeds until the further order of the Court determining the various claims upon it. The Receivers did sell said merchandise, and have since held and are now holding the proceeds, and will be compelled to hold the same until the decision of this Court, as the Supreme Court of the State of New York cannot properly direct the distribution of the money in the hands of its Receivers until it be determined what is the status of the Trustee in Bankruptcy in relation thereto. The entire fund in the hands of the Receivers, as your petitioners are informed and believe, is claimed by the Trustee in Bankruptcy.

The outstanding accounts were assigned by the bankrupts to certain other favored alleged creditors. The transfers of these accounts were also adjudged fraudulent by the Supreme Court of New York in your petitioners' equity action. These accounts have presumably been collected by these transferees and they now hold the proceeds. Neither the Receivers in the State Court, nor the Trustee, nor any other judgment creditors of Lesser Brothers, are in a position to collect these accounts from the transferees until it can be determined what are the rights of these creditors as between themselves.

There are now pending in the Supreme Court of the

State of New York seven actions brought by various judgment-creditors to set aside in their favor the transfers of Lesser Brothers as fraudulent and void. There is also pending in said Supreme Court an action brought by the Receivers appointed by the State Court also to set aside these transfers and assignments in favor of the Receivers. There is also pending an action brought by the Trustee in Bankruptcy to accomplish the same result. There is also pending the action in which the Receivers were appointed brought to determine the various claims to the merchandise of which the Receivers hold the proceeds of sale. None of these actions can be finally determined until the decision of this Court, determining the rights of the various judgment-creditors in their relation to the trustee of the bankrupts' estate. The prosecution of many of them is, in fact, at the present time enjoined by the trustee pending said decision, and those of them which are not, are liable to be so enjoined at any time.

There are also pending, as your petitioners are informed, petitions in the Circuit Court of Appeals for the Second Circuit to review various orders made by said District Court enjoining proceedings in the State Courts which cannot be properly passed upon by said Circuit Court of Appeals until this Court has answered the questions certified to it. In other words the delay in this Court prevents the final settlement and disposition of the property of the bankrupts now in the hands of said Receivers or to be recovered in actions against the transferees of the accounts.

It will be an immense saving to all parties concerned if this Court can speedily hear and determine the questions involved. In the meantime the assets of the bankrupt estate in the hands of the transferees of the Lessers are likely to be dissipated, and it will become more and more difficult to collect from these transferees the amounts for which they are liable.

3. Moreover, the questions certified are such as are of public importance and essential to a uniform construction and administration of the bankrupt act through-

out the United States. It is of importance, your petitioners respectfully submit, that a decision on them should be rendered as soon as possible. Your petitioners are informed that the question as to the jurisdiction of the District Court is one which has been raised in other courts of the United States and in the State courts and has been decided adversely to the decision of the District Court here to be reviewed (Frazier *v.* Southern Loan & Trust Co., 99 Fed. Rep., 707. *In re* Ward, 5 Amer. Bank. Rep., 215). In the latter case Judge Lowell says: "It is greatly to be desired that a further exposition of the jurisdiction of the District Court in bankruptcy should be made as speedily as possible by the Supreme Court." The question concerning the validity and precedence of the lien obtained by the commencement of a judgment creditors' action has also been elsewhere decided adversely to the decision of the District Court here to be reviewed (Doyle *v.* Heath, 47 Atl. Rep., 213; Taylor *v.* Taylor, 45 Atl. Rep., 440). Your petitioners are advised by their counsel that it will be of great service to the proper administration of the bankruptcy law, especially in avoiding a conflict between the courts of the United States and of the various States, if this Court may deem it proper to consider and decide the questions certified with as little delay as possible.

Wherefore your petitioners humbly pray that this Court may advance the argument to be had upon the said certificate of the Circuit Court of Appeals, and set the same down for a particular day in the immediate future.

And your petitioners will ever pray, &c.

METCALF BROS. & CO.,
By STICKNEY, SPENCER & ORDWAY,
Solicitors,
31 Nassau Street,
New York City.

NELSON S. SPENCER,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

METCALF BROTHERS & COMPANY, Petitioners,	
AGAINST	October Term 1901.
BENJAMIN BARKER, JR., Trustee in Bankruptcy of LESSER BROTHERS, Respondent.	No. 269.

Brief for Petitioners in reply to Brief for Respondents.

The respondent's counsel, in their statement of the facts, have omitted to follow the certificate of the Circuit Court of Appeals and have made their own statement. Their argument is thus in part based upon a record not before this Court, and which, we may add, does not in fact exist. The statements of fact alleged by them, which do not appear in the record, are not very material, and it seems sufficient at this time to point out the fact and to refer the Court to the certificate for the facts to be considered.

Among other things, they have quoted throughout their brief the opinion of the Circuit Court of Appeals as an authority. This opinion, however has been withdrawn by that Court. (See 108 Fed. Rep., p. 202, note.) Although it does not appear in the record, it is true that the Circuit Court of Appeals at first decided the petition against the petitioners, but upon a petition showing error a reargument was granted and had. That Court has not yet decided the matter upon the reargument, but, to enable it to do so, has certified to this

Court certain questions specified in the certificate. The opinion first rendered by it was withdrawn and, in consequence, no reference was made to it in the brief for the petitioners. Although, in our judgment, the opinion was exceedingly vulnerable, it seemed unnecessary to combat propositions no longer advanced. The statement of procedure appearing on p. 6 of the brief for the respondent is erroneous.

To such portions of the brief for the respondent as we have any suggestions to make, we will reply in the order in which they are there presented.

I.—*The first question certified is in proper form.*

It raises a single question of law.

In *McHenry* v. *Alford*, 168 U. S., 651, cited by the respondent's counsel as authority to the contrary, the question was whether the Circuit Court had jurisdiction "to hear and decide said case." This Court says (p. 659): "Neither party (so far as appears from the "record) raised any question of jurisdiction in the "Circuit Court to hear and determine the whole case." After referring to a number of possible objections to the jurisdiction which might have been made, the opinion continues: "We should not be asked to grope our "way through the papers submitted and examine every "objection that imagination could raise, with no hint "as to what, if any, objection is really supposed to ex-"ist." For these reasons the Court refused to answer the question.

Here the facts upon which jurisdiction was assumed and the objection to the jurisdiction, originally made in the District Court, are explicitly stated in the certificate (pp. 3, 4).

The question can be distinctly answered without regard to the other issues of law; it is not a question of fact or of mixed law and fact, and does not involve any conclusion or judgment upon the weight or effect of testimony or facts adduced; and it does not and could not embrace the whole case.

It is the same question which was answered in the following cases:

Bardes v. *First National Bank of Hawarden*, 178 N. Y., 524, 526:

"3d. Can this Court, being the District Court for the "Northern District of Iowa, take jurisdiction over the "suit as it now stands on the record?"

White v. *Schloerb*, 178 N. Y., 542, 545:

"First. Whether the District Court sitting in bank-"ruptcy had jurisdiction by summary proceedings to "compel the return of the property seized."

Wall v. *Cox*, 181 U. S., 244, 246:

"First. Under the facts and the pleadings above "stated, had the District Court of the United States for "the Western District of North Carolina jurisdiction "over the controversy?"

In this case the Court say: "The statement certified "distinctly shows that the defendants, specially appear-"ing for the purpose, protested that the District Court "had no jurisdiction to entertain this bill, or to de-"termine the question arising between the trustee and "the defendants, and that the defendants did not con-"sent to the jurisdiction of the Court. The answer to "the first question certified must therefore be that the "District Court had no jurisdiction of the case."

II.—*The nature of the rights obtained by a judgment creditor by filing a creditors' bill.*

Under this caption the respondent's counsel discuss at some length, and with much ability, a number of propositions of law which are not, as we conceive it, involved in the consideration of the questions certified. We will, however, follow their argument.

As we read their statement of law as to priorities of creditors, it is capable of conveying an inaccurate impression, though not, of course, so intended. The law as to priorities, we submit, is as follows:

A creditor's right to priority varies with his process

and the kind of property affected. Such property is either (*a*) property subject to levy and sale under an execution, or (*b*) property not so subject. The first kind is termed legal assets of the debtor, the second, equitable.

(*a*) Property subject to levy and sale under an execution.

This is either real property or personal property capable of manual delivery. On real property a creditor obtains a lien by the entry of a judgment; on tangible personal property by the delivery of an execution to the Sheriff (not, as the respondent's counsel state, through the levy by the Sheriff). Such real or personal property affected by an apparent transfer may be treated by the judgment creditor in two ways: He may either (1) sell it through the agency of an execution and defend the judgment debtor's title in an action brought against him by the claimant thereto; or (2) he may have the claimant's title adjudged invalid in an action brought for the purpose prior to a sale. In the latter case the sale may be either under an execution or by a receiver appointed for the purpose.

Whichever method the creditor may pursue, the priorities are the same, unless a receiver be appointed. If a receiver be appointed, his title, and the title of any subsequent purchaser, is coincident with the date of his appointment, or, technically, the involuntary conveyance of the property to him by the judgment debtor which the Court decrees. The creditor has elected to abandon the lien of his judgment or execution, as the case may be, and to rely on the later title of the receiver. A receiver's title, then, in an action affecting legal assets, is subject to any prior lien by judgment or execution outstanding in favor of any other creditor.

Considering, first, the case of real estate, the result is this: A judgment creditor's action simply removes the cloud on the title and the judgments affecting it are satisfied in the order of their priority. This is the situation in the case at bar as to the real property conveyed to Lilianthal. No receiver was appointed by the

Court. If a receiver had been appointed, the result would have been to postpone the plaintiff's lien to all other judgments against the Lessers.

Chautauque County Bank v. *Risley*, 19 N. Y., 369.

White's Bk. of Buffalo et al. v. *Farthing et al.*, 101 N. Y., 344.

As to personal property capable of manual delivery, the result is the same with this modification. The lien on personal property arises from the delivery of the execution to the Sheriff. If the execution is returned or abates, the lien ceases. If the creditor's action be brought in aid of an execution issued by him, his priority is similar to that in the case of real estate, and is governed by the executions outstanding at the time of judgment. If his action be brought after the return of an execution unsatisfied, his priority is subject to any earlier executions outstanding or satisfied through a sale of the property affected. If at the time of judgment in the creditor's action there be no outstanding execution or there has been no sale under a prior execution, the judgment creditor may pursue the property either through a new execution or a receiver and obtain priority of payment.

Storm v. *Waddell*, 2 Sand., Ch. 494.

Becker v. *Torrance*, 31 N. Y., 631.

First National Bank v. *Shuler*, 153 N. Y., 163, 172.

The case at bar is not governed by these propositions of law, as none of the personal property involved was legal assets, so called.

(*b*) Property not subject to levy and sale under an execution.

As to all such property, termed equitable assets, the judgment creditor first commencing an action to subject it to the payment of his judgment obtains, by the com-

mencement of the suit, a lien upon it and is entitled to priority of payment.

This lien is like the lien of a judgment on real property or the lien of an execution on personal property subject to an execution. It does not depend on a receivership, although a receiver is sometimes appointed. Such a receiver is for the purpose of preserving the property from loss and not for the purpose of establishing any title. In an action affecting legal assets, a receiver is a matter of right; in one affecting equitable assets it is a matter of discretion. In the latter case a receiver will be appointed, as the Court say in *Bloodgood v. Clark*, 4 Paige, 574, "provided the complainant can "satisfy the Court that he has an equitable claim to the "property in controversy and that a receiver is necessary to preserve the same from loss."

The lien is not extinguished by the death of the judgment debtor, but survives against his equitable assets in the hands of his administrator.

Brown v. *Nichols*, 42 N. Y., 26.
First National Bank v. *Shuler*, 153 N. Y., 163, 171.
Reynolds v. *Aetna Life Ins. Co.*, 160 N. Y., 635, 648.

In *Brown* v. *Nichols*, the same argument was made, which the respondent's counsel now make. It was urged that the lien is merely an equitable lien which could become effective only on the appointment of a receiver, and, as a receiver had not been appointed, it would not be allowed to prevail over a legal right, such as the appointment of an administrator who must distribute the assets of the intestate according to a prescribed rule of law (see dissenting opinion of Ingalls, J., p. 34). But the Court (including Grover, dissenting, on another point, see pp. 42, 43) decided otherwise. They say (p. 30): "Aside from the effect the Revised Statutes "may have upon the subject, it will not be questioned "that the lien the judgment creditor gets by virtue of "the commencement of his equitable suit would sur-

" vive the death of the debtor. (*Storm* v. *Waddell*, 2 " Sand., Ch., 494.) The property then passes to the " personal representatives charged with this lien. The " assets are subject to this lien, and the debts of the " debtor are to be paid out of them after this lien, *like* " *any other legal lien*, has been first satisfied."

The same doctrine is repeated in the later cases cited.

These authorities, irrespective of those cited on our principal brief, we submit, dispose of the contention of the respondent's counsel (Brief p. 15) that the lien " is not protected against such transfers of title *in invitum* as may in the meantime be imposed by the paramount act of Congress in establishing a uniform system of bankruptcy." There is no difference in this respect between the right of a trustee in bankruptcy and the right of an administrator, the title of each of whom arises only by operation of law. It is to be borne in mind, moreover, that a trustee in bankruptcy stands in the shoes of the bankrupt and takes only his title.

The contention of the respondent's counsel that an effective lien depends in some way upon a present transfer of part of the debtor's property out of himself, either voluntarily or by a forcible dispossession, is erroneous.

The lien of a judgment on real estate (which exists without an execution), no more lessens the estate of the debtor than the lien or *lis pendens* of a creditor's action. (*Conrad* v. *The Atlantic Insurance Company*, 1 Peters, 386, 443.)

The lien of an execution on personal property does not, as counsel state (Brief, p. 14), depend on a *levy* by the Sheriff, or any forcible taking away of property. It comes into existence by its delivery to the Sheriff.

New York Code of Civil Procedure, §1405: " The goods and chattels of a judgment creditor * * * are * * * bound by the execution, from the time of the delivery thereof to the proper officer."

Hathaway v. *Howell*, 54 N. Y., 97.

Indeed, at common law, goods were bound from the teste of the writ and the alteration of this rule comes

through statute (see *ex parte Foster*, 2 Story, 131, 151).

The same is true of the lien of a writ of attachment.

There is no difference between these liens established by operation of law, *in invitum*, and one established voluntarily, as by mortgage or pledge. Every one of them requires a further proceeding to make it effective. A mortgage requires a foreclosure action to establish the lien and the mortgagee's right. A judgment on real estate requires a sale under an execution. An execution on personal property requires a levy and sale. The lien of a creditor's action requires a judgment. But none of them are any the less valid and effective liens.

None of the personal property affected by the case at bar is subject to a levy and sale under an execution, or is legal assets. None of it could be reached except through a creditor's action. The lien is therefore not dependent upon a receiver, nor can it be superseded in any way. It arises with the commencement of the action and exists independent of any receivership.

In their argument the respondent's counsel seem to confound the effect of a receivership in a creditor's action affecting legal assets and in one affecting equitable assets. In the first, a receivership is necessary to prevent a subsequent levy and the property is even then subject to the lien of any prior executions. In the second, it is unnecessary, is a convenience merely, and adds nothing to the creditor's security.

Kitchen v. *Lowery*, 127 N. Y., 53, 60.
Matter of Clover, 8 App. Div., 556, 558; aff'd 154 N. Y., 443.

As to equitable assets the lien established by the commencement of the action is perfect in itself.

A judgment note or a confession of judgment, not utilized by the creditor, to which the respondent's counsel liken the lien obtained in a creditor's action (Brief, pp. 17, 18), is not a lien at all. At most these instruments are merely agreements for liens. They are nowhere recognized by the law as liens.

The alleged inchoate quality of the lien obtained in

a judgment creditor's action has already been discussed by us in our principal brief. To the other authorities cited, we may add the characterization of the action contained in *Fidelity Insurance Co.* v. *Huntington*, 117 U. S., 280: "The suit as brought by Huntington is a "creditor's bill to subject incumbered property to the "payment of his judgment by a sale and distribution "of the proceeds among the lien holders according to "their respective priorities. *There is but a single "cause of action, and that is the equitable execution of "a judgment against the property of the judgment "debtor.* This cause of action is not divisible."

The commencement of the equitable action—the equitable execution—is like the delivery to the sheriff of the legal writ; by each act a lien is created. The analogy is precise and the one can be no more successfully assailed than the other.

III.—*All the property affected by the creditor's suit, except the real estate, was equitable assets.*

No question as to this was raised by the District Court or the Circuit Court of Appeals. No argument on the point was therefore presented in our principal brief.

Whether assets are legal or equitable, so as to be subject to the lien of a creditor's action, is determined by ascertaining whether they are or are not subject to levy and sale under an execution. It is plain that none of the assets in question were so subject and they are therefore clearly equitable.

The property, as appears from the certificate (Record, pp. 1, 2), was as follows:

1. Outstanding accounts of Lesser Brothers transferred to Marcus A. Adler and others. Choses in action are not and never have been subject to levy and sale under an execution.

2. Money in the hands of receivers appointed by the Supreme Court of New York. Property in the custody of the Court is not and never has been subject to an execution.

Moreover, all the property which was originally mer-

chandise has been converted into equitable assets by a sale under an order of the Supreme Court of New York. The proceeds of that sale are held by the receivers.

The bankrupts confessed certain judgments in favor of certain favored creditors. Under executions issued on these confessed judgments, the Sheriff took possession of certain merchandise belonging to the bankrupts, being clothing, material and stock in trade. A receiver of the bankrupts' partnership property was then collusively appointed. This receiver, certain replevin creditors, the confessed judgment creditors, and subsequent judgment creditors, all claimed the merchandise. Thereupon the Court took possession of the property, appointed new receivers to take possession of it, ordered the merchandise sold and the proceeds to be held by the receivers subject to the further order of the Court. This order was made November 23, 1896. The goods were sold by the receivers pursuant to the order, and the receivers now hold the proceeds. They have been directed by the Supreme Court to pay a part of such proceeds to the petitioners in satisfaction of their judgments. (Record, p. 2, fol. 3.)

The petitioner's equity action was begun December 17, 1896. There was not at that time, nor had there been since November 23, 1896, at least, when the property was taken into the custody of the Court, any property upon which an execution could be levied. And even if the property had not been in the custody of the Court, inasmuch as it had been sold and its identity lost, it ceased to be legal and became equitable assets.

Lawrence v. *Bank of the Republic*, 35 N. Y., 320. In this case the bank sought to levy by attachment on the proceeds of a sale of its debtor's property made by his assignee for the benefit of creditors. The Court held that the assets were equitable and not legal. They say: "The case is, however, different, when the assigned "property has been sold by the assignees, and its iden- "tity gone. The proceeds cannot be attached or levied "upon by the Sheriff as the debtor's property. Setting "aside the assignment simply, would not vest the title

" to such proceeds in the debtors. The only remedy of " the creditor, in such a case, is for him to institute a " creditor's suit."

In *Thurber* v. *Blanck*, 50 N. Y., 80, 86, 87, the Court affirm this ruling, saying: " I think this case falls with- " in the principle decided in *Lawrence* v. *The Bank of* " *the Republic*. There the property had been converted " into money, requiring an equitable action to reach."

In *Braem et al.* v. *M. N. Bank*, 127 N. Y., 508, the Court say (p. 516): " And while remedies at law, " either affirmative or defensive, may be supported in " behalf of the judgment creditor having a lien upon, " or a purchaser on execution sale of tangible personal " property transferred by the judgment debtor in fraud " of his creditors before the levy, the same rule is not " applicable to the proceeds received by the fraudulent " vendee on sale by him of the property. They, for " the pursuit of the creditor, are the subject of equitable " jurisdiction only."

The respondent's counsel travel much outside the record in their classification of the property for the purpose of arguing this point. But conceding the situation as they state it, the facts plainly show that the assets affected by the action are equitable. (Brief, pp. 32-35.)

In Classes 1 and *3a*, the existence of such accounts and goods does not appear in the record. Of course, if they are not affected by the action, no further discussion is needed. Similarly the real property, Class 2, is not, as counsel state, involved in this proceeding.

Class *3b* we have already discussed. The statement as to Class 4—the accounts—is erroneous, as, although the Appellate Division did dismiss the action as to Adler, one of the transferees of the accounts, the Court of Appeals reversed the action of the Appellate Division and restored the judgment of the Special Term. (Record, p. 3, fols. 6, 7.) The accounts were therefore

directly involved in and subject to the lien of the creditor's action. Even the respondent's counsel do not claim that choses in action are not equitable assets.

IV.—The remaining points discussed by the respondent's counsel are covered by our consideration of them in the principal brief.

NELSON S. SPENCER,
Of Counsel for the Petitioners.

Office Supreme Court U.S.
FILED
APR 18 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 269.

IN THE MATTER
OF
TOBIAS LESSER, ISRAEL LESSER and SIMON LESSER, and the firm of LESSER BROTHERS,
Bankrupts.

APPLICATION
OF
METCALF BROTHERS & COMPANY, *Petitioners*, for Review of certain Proceedings, *etc.*

BENJAMIN BARKER, JR., Trustee in Bankruptcy,
Respondent.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF.

OTTO T. HESS,
M'CREADY SYKES,
Of Counsel for the Respondent.

C. G. Burgoyne, Walker and Centre Streets, New York.

In the Supreme Court of the United States.

In the Matter of Tobias Lesser, Israel Lesser and Simon Lesser, and the firm of Lesser Brothers, Bankrupts.	October Term, 1901.
Application of Metcalf Brothers & Company, *Petitioners*, for Review of certain Proceedings, *etc.*	No. 269.
Benjamin Barker, Jr., Trustee in Bankruptcy, *Respondent.*	

BRIEF ON BEHALF OF BENJAMIN BARKER, JR., TRUSTEE IN BANKRUPTCY.

Statement.

This matter comes before this Court on certification of certain questions by the United States Circuit Court of Appeals for the Second Circuit, arising in a proceed-

ing in bankruptcy under Section 25, Subdivision *d*, of the National Bankruptcy Act of 1898.

The order, the correctness of which is sought to be reviewed, was one made by the United States District Court for the Southern District of New York, enjoining the threatened appropriation by certain creditors of the bankrupts of assets of the estate, by virtue of an alleged lien, determined by the Courts below to be in violation of the provisions of the Bankruptcy Act.

The questions certified embody in interrogative form certain of the legal aspects contended for by the lienors. The facts briefly stated, are as follows :

Tobias Lesser, Israel Lesser and Simon Lesser, comprising the firm of Lesser Brothers, the bankrupts, had been doing an extensive business in the City of New York as wholesale clothiers. On the 2d of October, 1896, after having on that day confessed judgments in the Supreme Court of the State of New York to various creditors, under which executions were at once issued to the Sheriff of the County of New York, the bankrupts transferred all their outstanding accounts to others and to still another made conveyances of their individual real estate. Having thus entirely depleted themselves of their assets, on the same day two of the partners commenced a collusive action in the Supreme Court of the State of New York, in New York County, against the third, for the dissolution of the firm, and on the same day, on consent of all parties to the action, one Morris Moses, who was nominated by and was in collusion with them, was, by a fraud upon the Court, appointed Receiver of the firm. On application of certain creditors to the Court, James T. Franklin was appointed co-Receiver. On the 2d day of October, 1896, and during the days immediately ensuing, replevin actions were begun by numerous creditors of the firm to recover goods sold and delivered by them to Lesser Brothers. The Sheriff having levied on the

property under the confessed judgments, the writs had issued to one of the Coroners of the County of New York. The Receivers thereupon brought an action in the Supreme Court of the State of New York, in New York County, to enjoin the prosecution of these numerous suits, and the Court thereupon made an order in that suit on the 23d of November, 1896, enjoining the replevin creditors from prosecuting their actions, following the precedent in such cases established by *National Park Bank vs. Goddard*, 131 N. Y., 494. The Sheriff, under the executions issued upon the confessed judgments, had levied on all the merchandise of Lesser Brothers, and the Court thereupon directed that the property so levied upon by the Sheriff be turned over to the Receivers Franklin and Moses, and that it should be held by them subject to the claims of all parties. Pursuant to this order the goods were sold and the Receivers now hold the proceeds thereof.

In December, 1896, the petitioners, Metcalf Brothers & Company, creditors of Lesser Brothers who after the failure had reduced their claim to judgment, commenced a judgment creditors' action in the Supreme Court of the State of New York, in New York County, against the Lessers, their Receivers Moses and Franklin, the confessed judgment creditors, two of the transferees of accounts and the transferee of the real estate, to set aside the receivership, the conveyances, transfers and confessions of judgment as fraudulent and void as against them. They asked for the relief usual in a judgment creditor's action. *Metcalf Brothers & Company did not obtain an injunction nor did they have a Receiver appointed in that action.* Moses and Franklin, the Receivers of Lesser Brothers, who were parties defendant to that action, asked for certain relief against some of their co-defendants. That action was tried at a Special Term of the Supreme Court before Mr. Justice RUSSELL, and judgment was

rendered that the acts of the Lessers were fraudulent, but that the assets should be turned over to the Receivers Moses and Franklin, Mr. Justice RUSSELL holding that the plaintiffs would "be rewarded to a substantial extent by the relief granted if they" received "their fair share of the insolvents' estate" (*Metcalf vs. Moses*, 22 Misc., 664, at page 668). This judgment was entered on the 6th day of April, 1898. An appeal was taken to the Appellate Division, which in January, 1899, reversed the judgment of the Court below in so far as it denied the plaintiffs their preference, but affirmed the judgment in other respects, except in so far as the latter set aside the transfers to defendants Adler and Lilianthal (*Metcalf vs. Moses*, 35 App. Div., 596).

Though the decision of the Appellate Division was handed down in December, 1898, to quote the language of the certificate, "delay in the entry of final judgment was caused by various motions before the Appellate Division for reargument," and it was not until January 31st, 1899, that the judgment was entered giving Metcalf Brothers & Company their preference.* Less than four months thereafter, and on May 12th, 1899, the Lessers, individually and as a firm, were, on their voluntary petition, adjudicated bankrupts, and the respondent was appointed trustee in bankruptcy of the Lessers, individually and as a firm.

By Section 67*f* of the Bankruptcy Act it is declared that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person

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* Owing to an appeal to the Court of Appeals, accompanied by a stay of all proceedings, pending the appeal no attempt was made to enforce the judgment of January 31st, 1899. The stay expiring with the affirmance of the judgment by the Court of Appeals in February, 1900 (*Metcalf vs. Moses*, 161 N. Y., 587), the trustee in bankruptcy sought the aid of the District Court.

who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy,

> "*shall be deemed null and void* in case he (the bankrupt) is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such * * * judgment * * * or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect;" * * *

Section 70 of the Act provides that the trustee shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to all

> "(4) property transferred by him (the bankrupt) in fraud of his creditors."

By Section 2 of the Act the District Court has jurisdiction to

> "(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act."

On the foregoing facts the United States Circuit Court of Appeals for the Second Circuit affirmed the order of the United States District Court for the Southern District of New York, enjoining Metcalf Brothers &

Company, creditors of the bankrupts, from appropriating the assets of the estate.

The opinion of Judge ADDISON BROWN, of the District Court, is reported in 3 Am. Bank. Rep., 815; 100 Fed. Rep., 433.

The opinion of the Circuit Court of Appeals reviewing at length what it refers to as "the carefully-stated opinion of the District Judge," and concurring therein, is reported in 5 Am. Bank. Rep., 320.

Subsequently, on a motion by Metcalf Brothers & Company praying for a reargument, or in the alternative to have the matter reviewed by this Court, the Circuit Court of Appeals withheld its mandate and certified the following questions to this Court:

(1) Had the District Court of the United States for the Southern District of New York jurisdiction to make the injunction order in question?

(2) If said Court had jurisdiction to restrain Metcalf Brothers & Co. from receiving the fund in question, could such jurisdiction be exercised by summary proceedings?

(3) Did Metcalf Brothers & Co. by the commencement of their creditors' action acquire a lien on the property of the bankrupts superior to the title of the trustee thereto?

(4) If the lien acquired by the commencement of the creditors' action was inchoate merely, was it perfected by a judgment obtained more than four months prior to the filing of the petition of the Lessers in bankruptcy within the meaning of the provisions of the Act of Congress of July 1, 1898, known as the Bankruptcy Act?

(5) If the lien acquired by the commencement of the creditors' action was inchoate merely, was the judg-

ment in the creditors' action, whenever obtained, one which is avoided by any of the provisions of the Act of Congress of July 1, 1898, known as the Bankruptcy Act?

The Questions Presented.

Several of the questions certified are so inter-related that unnecessary repetition may be saved by an examination of the somewhat complicated facts and of the law applicable thereto, even though to a certain extent such examination does not follow exactly the questions in the order given.

In order for example that the Court may determine whether or not the District Court had jurisdiction in the premises, it is essential that the facts on which such jurisdiction depends should be fully reviewed.

But at the outset we respectfully submit that in accordance with the rulings of this Court on the practice of certifying questions from the United States Circuit Court of Appeals, it must be held that the first question in the case at bar cannot be answered at all by this Court. This Court had before it the precise point which we now raise, in *McHenry vs. Alford*, 168 U. S., 651.

The question certified in the case at bar is:

> HAD THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK JURISDICTION TO MAKE THE INJUNCTION ORDER IN QUESTION?

In the case cited the question was (at p. 658):

> "Has the United States Circuit Court for the District of North Dakota jurisdiction to hear and decide said case?"

This Court refused to answer that question on the ground that it did not plainly raise a single question

of law, but obviously brought up the whole case for review. The Court says (at p. 659), Mr. Justice PECKHAM writing the opinion, using the language of the Chief Justice in *United States vs. Union Pacific Railway*, 168 U. S., 505, that each question certified to this Court from the United States Circuit Court of Appeals has to be

> " a distinct point or proposition of law, clearly stated, so that it can be distinctly answered without regard to the other issues of law in the case ; to be a question of law only and not a question of fact, or of mixed law and fact, and hence could not * * * * embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions."

In *McHenry vs. Alford*, the Court gave as its reason for refusing to answer the question, not so much that in so doing it would violate any technical rule of Court, as because this Court, without the record before it, would not assume to overrule the conclusion reached by the lower Court after consideration of the whole case with the record before it.

The same difficulty that confronts the Court in answering such a general question still more strikingly confronts the litigants. Under a long established rule of the Federal Courts, when a case comes up on a writ of error, the plaintiff in error must preface his argument with a specific enumeration of the grounds on which he asks for a reversal. Thus any issue that he may invite as to the efficiency of the proceeding below in acquiring jurisdiction is specifically and distinctly drawn. In such cases the question of jurisdiction is not only specified in the brief, but is specified in the record and is clearly presented by the proper exceptions in the bill of exceptions. On such a record, therefore, the question of jurisdiction is always capable of determination by a Court of last resort, for that

Court has everything before it that the lower Court had before it. The suggestion in *McHenry vs. Alford* (at p. 659) that the Court could not grope its way "through the papers submitted and "examine every objection that imagination could raise, "with no hint as to what, if any, objection is really "supposed to exist," points out the insuperable obstacle that prevents this Court answering the first question in the case at bar.

So in this case, for example, in the Courts below something was said at different times about insufficient service of the papers, an objection apparently waived, inasmuch as the creditors appeared in this proceeding and argued the motion on its merits; something was said about the creditors not being proper parties to the bankruptcy proceedings, an objection answered by the District Court, and not seriously pressed in the Circuit Court of Appeals. And if the objection to the jurisdiction be the general one that the District Court of the United States is not vested with power to make such an order, then before this Court can answer this question it will have to read the 19 subdivisions of Section 2 of the Bankruptcy Act relating to the jurisdiction of the District Court, and when it has read them it will be in no better position to answer the question than it was before, because it will have no record to show whether or not the papers presented to the Court below set forth the facts to which one of the subdivisions of Section 2 might be applicable. In *McHenry vs. Alford*, the Court said (at p. 659): "Guided by these rules, we find that the "first question does not comply with their require-"ments. No single question of law is plainly raised "therein." The first question certified to this Court in the case at bar is open to the same fatal objection.

We think, therefore, that the question of jurisdiction in the premises will be sufficiently covered in the

consideration of the second question certified to this Court, and which, as we have before indicated, we will discuss after we have presented to the Court the reasons which led the District Court to exercise such jurisdiction.

On the very meagre record presented by the certificate we fear that the Court may have such difficulty in answering this second jurisdictional question as to impel it to take the same course as to that also as was taken in *McHenry vs. Alford;* nevertheless this would accomplish but little good to any of the parties to this proceeding, and we therefore think that after our discussion of the third question this Court will feel warranted in answering the second question in the affirmative.

The third question presented to this Court is as follows:

> DID METCALF BROTHERS & CO. BY THE COMMENCEMENT OF THEIR CREDITORS' ACTION ACQUIRE A LIEN ON THE PROPERTY OF THE BANKRUPTS SUPERIOR TO THE TITLE OF THE TRUSTEE THERETO?

The contention of Metcalf Brothers & Company is that by the commencement of their judgment creditors' action in December, 1896, they obtained a lien on the property which should be recognized by the Court of Bankruptcy, notwithstanding that the judgment which they obtained is made void by the provisions of Section 67 *f* of the Bankruptcy Act.

And first it should be noted that in the case at bar there were no equitable assets. This is more fully discussed hereafter, but in order to follow at length the petitioners' careful and elaborate presentation, we will consider the nature of the lien obtained in a judgment creditor's action.

The fourth and fifth questions involve a further examination of the principles of law necessarily consid-

ered in any discussion of the third question, particularly in reference to the effect of the Bankruptcy Act.

I.

The nature of the rights obtained by a judgment creditor by filing a creditor's bill to set aside fraudulent transfers.

Out of the vast number of actions brought by judgment creditors to set aside fraudulent transfers made by judgment debtors, a doctrine has gradually grown up in relation to the respective priority among themselves of such creditors. This doctrine, expressed most favorably to the lienors (and without reference to the limitations necessarily imposed by the Bankruptcy Act, to which we will refer later), is as follows:

(a) As to Tangible Assets.

If a judgment creditor brings an action to set aside transfers of tangible assets—*viz.*, property in its *nature* subject to *execution*—made by the judgment debtor in fraud of his creditors, he will, irrespective of any similar action brought by any other judgment creditor, and in the absence of any levy or other actual physical *bona fide* change of ownership and of possession, be entitled if he recover final judgment, to receive the assets in question. But if at any time before he realizes the fruits of such a judgment, *another* judgment creditor proceeds actually to levy his execution, thus disregarding and *quoad hoc* nullifying the outstanding title given by the fraudulent transfer—and defends an action for trespass brought against the Sheriff, on the ground of the invalidity of the transfer—then such

creditor so levying execution will be allowed to retain the fruits thereof even as against the judgment creditor filing his bill in equity, although the latter had filed his bill before the levying of the execution. The theory upon which this last principle is based is that both judgment creditors being entitled to recover the amount of their judgments and both having originally the same equity, have, at the outset, the same right to nullify the fraudulent transfer. But the creditor, who in addition to his equity, acquires the *legal* title obtained by the levy, will be protected against him who has merely the equity; and the latter creditor—*viz.*, he who files the creditor's bill *without levying* execution—suffers no injustice, because the same resort was open to him, and he might, had he chosen, have levied an execution and taken the property notwithstanding the fraudulent transfer, and then justified and indemnified the Sheriff if the latter should be sued for trespass. It is manifest then that priority is in no way dependent upon the creditor first resorting to a Court of Chancery and invoking its aid, because the creditor who does first resort to that Court is liable to lose his priority to one who never resorts to a Court of Chancery at all. Nor is a different rule applied in cases where the property, although tangible, is for any reason not actually subject to execution. In *First National Bank vs. Shuler* (153 N. Y., at p. 172), it was said:

> "But in respect of chattels, subject to be taken
> "on execution, the rule seems to be that unless
> "the action is brought in aid of an execution,
> "the mere commencement of the action creates
> "no lien as against other creditors, and if any lien
> "whatever exists, it is so incomplete and imper-
> "fect that it is subject to be overreached by a sub-
> "sequent levy in favor of other creditors, made be-
> "fore the appointment of a receiver."

And in that case the Court held no lien attached, though the property was not in fact subject to

execution, being in the hands of the executor of an unadministered estate.

We have thus considered one of the great classes of judgment creditors' actions, and in that class is included every possible case of an action intended to reach tangible assets which are in their nature subject to execution; all other property falls under the other subdivision about to be considered; naturally all property which is not tangible is intangible, and all property which *is not* property in its nature subject to execution, *is* property not in its nature subject to execution.

(b) As to Intangible or "Equitable" Assets.

1. The nature of the lien.

Intangible assets, or property in its nature not subject to levy on execution, are often termed for convenience "equitable assets" and we shall use this term in speaking of them. It is often loosely stated that a judgment creditor, who is unable by any remedy at law to reach his debtor's equitable assets in the hands of a third person, by the mere filing of his bill in a court of equity obtains a lien on those assets.

The nature of a lien, however, as viewed by courts of equity, is to be determined not by vague and general language taken from reported opinions, but only by an examination of what the Courts have done in the particular cases. It is the *judgments* which Courts have rendered that furnish the test.

We maintain that the only lien against equitable assets acquired by a judgment creditor by the mere filing of a bill in equity is a right to have his judgment first paid, if he succeeds in obtaining a judgment setting aside the transfers—paid, in other words, to the exclusion of the transferees' legal title, and paid prior to the claims of other judgment creditors who may begin similar actions. In other words, it is only a

right to priority of payment *in case the judgment creditor obtains his judgment in equity.* Now, because such a right to priority of payment has some of the characteristics of a "lien," it has sometimes been spoken of as a "lien." For most purposes it is a lien, but it is not a lien in the important and, in this case, controlling feature—*viz.*, that *it creates no present right or title in or to the chose in action.*

In this it differs radically from a mortgage, the typical lien. A mortgage effectually transfers a present interest and equitable estate in the land, out of the mortgagor and into the mortgagee. It is not an inchoate lien, but is effective from the moment of its creation and needs no judgment of foreclosure to perfect the transfer. If the debt is not paid the mortgagee is entitled to take the rents and profits to pay his debt. And he takes them under the present grant of the mortgage itself. All that the decree of foreclosure does, is to eliminate the equity of redemption remaining in the mortgagor so that a complete title may be given; but the foreclosure decree *creates* no lien and *perfects* no lien. Or, take the case of the lien of an execution; here the levy itself creates the lien by substituting the possession of an officer for that of the debtor. It is a forcible taking away of property, and completes the transfer *ex proprio vigore.* In the same way a lien on real estate takes by statute from the debtor a certain right, estate or interest in his land and vests it in his creditor, who may realize on it on an execution sale. In all these cases of true liens we have the constant quality of a present transfer of part of the debtor's property out of himself and into some one else, and this is likewise true of equitable liens. A complete equitable lien, no less than a legal lien, involves the present lessening of one person's title and a transfer of *some part* of that title into another. Of course this always carries with it a right to priority of payment; and so ordinarily the right to priority of payment is as good as a present in-

terest in the thing itself. Now the whole equitable doctrine of preference obtained against equitable assets by filing a creditor's bill is based on this right to *priority of payment*. It has come into being in recognition of the practical justice of giving such priority, and such priority is all that the doctrine involves. It has nothing to do with the essential characteristics of a real lien, such as a mortgage lien, and when an attempt is made to extend it in that way the real nature of the lien becomes clear. To obtain the result of a present transfer the remedy of a receivership is open to the judgment creditor, and if he does not avail himself of it, while he is safe against the acts of the debtor and against the claims of other creditors similarly situated, he is not protected against such transfers of title *in invitum* as may in the meantime be imposed by the paramount Act of Congress in establishing a uniform system of bankruptcy.

The learned counsel for the petitioners terms the filing of the creditor's bill the levying of an equitable execution; but such an execution must in order to operate as a real lien be perfected by a judgment, and, until then, the preference obtained by the judgment creditor is simply one of priority in the event of the successful *levy* of the equitable execution on the assets of the debtor by the perfected judgment. When an execution is delivered to the Sheriff, no lien is obtained until the Sheriff has actually made the levy. The law presumes that the levy is made for the benefit of the judgment creditor who first placed the writ in the hands of the Sheriff. What the Courts mean by terming the filing of the bill the giving of a lien or a priority to a judgment creditor, is exactly analagous to what happens in the case of the delivery of a writ to the Sheriff. At law the levy is presumed to be made for the benefit of the judgment creditor who has first delivered the writ to the Sheriff; in equity the equitable execution in the

form of the decree of a court of equity is presumed to be made for the benefit of the person who first filed his bill. For the filing of the bill is simply this : A writ of *elegit* or *fieri facias* has been issued to the Sheriff, but certain legal obstacles interfere with his making the levy and the judgment creditor then applies to the Chancellor to make the levy. But before the judgment creditor can be said to obtain a lien the levy must actually be made ; and if the rights of third parties intervene before it is made, the priority of the judgment creditor who has filed his bill stands on no firmer ground than the priority of the judgment creditor who has first delivered his writ to the Sheriff. While it may be true that a judgment creditor, by invoking the aid of a receivership, might take the assets of the debtor within the protecting arm of the Court of Chancery, and keep them from the grasp of the trustee in bankruptcy when the debtor subsequently goes into bankruptcy, yet, if he does *not* do this, the property is lost to him.

In the case at bar no Receiver had been appointed or even applied for, and, though the petitioners were safe against the acts of the debtors and against the claims of other creditors similarly situated, they were not, as already pointed out, protected against such transfers of title *in invitum* as might in the meantime be imposed, and which were imposed, by the supreme law of the land.

The parallel between the mortgage and the judgment creditor's action, so much relied on by our opponents, would seem, on analysis, utterly to fall. As we have pointed out, the lien of a mortgage is not *created* in the action to foreclose it. The alleged lien of the judgment creditor's action is so created. If the action to foreclose the mortgage were discontinued the day after it was begun, that would in no way affect the lien of the mortgage. But the filing of a creditor's bill is merely the *starting* of a lien. Such a " lien " is in its very essence integrally bound up with the specific

legal proceeding which gives it birth, and it never fructifies except by the consummation of that very legal proceeding; the whole completed proceeding is necessary to perfect the lien, and the chain is no stronger than its weakest link. If the action be discontinued, the "lien" falls and that particular "lien" can never be revived. The judgment creditor may get a fresh "lien" by beginning a new action, but it is in no way a continuance of his old "lien." The "lien" is inseparably connected from beginning to end with the specific legal proceeding which inaugurates it. If this legal proceeding meets an insurmountable obstacle the lien dies with the suit. And the Bankruptcy Act, in its provisions avoiding judgments obtained within four months of the bankruptcy, is precisely such an obstacle.

A creditor's bill is in this respect strikingly like the judgment note in use in some jurisdictions. The inchoate lien initiated by the note is simply evidence of *the right to have a judgment* (which is much more than a creditor's bill is). It is evidence of the highest nature; it is a judgment, all except the entry. And yet a judgment entered on such a note within four months of bankruptcy has been held to be void under the Bankruptcy Act. *Matter of Richards*, 96 Fed. Rep., 935 (U. S. Circuit Court of Appeals, Seventh Circuit).

In that case the Court says (at p. 941):

> "We are also unable to uphold the contention "that the lien of this judgment must be upheld "because the acts which led up to and pro- "cured it occurred more than four months before "the bankruptcy, and therefore did not constitute "the acts of bankruptcy within subdivisions '*a*' "and '*b*' of section 3. The validity of the lien "depends upon the terms of the act speaking to "that subject, but not upon the question whether "the acts which resulted in the lien were acts "which subjected the debtor to proceedings in "bankruptcy. It is doubtless true that the debtor

"could not have been forced into bankruptcy be-
"cause of of the acts done by him; but under the
"law, when for any reason bankruptcy has super-
"vened and adjudication has been determined by
"the court, all liens which fall under the ban of
"section 67 are avoided, whether the debtor has
"been or could have been adjudicated a bankrupt
"for his acts with reference any specific lien. We
"are constrained to the conclusion that by sub-
"division '*f*' of section 67 all liens obtained
"through legal proceedings 'against a person who
"'is insolvent,' within four months of the bank-
"ruptcy are avoided. It is not within our province
"to speak of the policy of the act. It is sufficient
"to us that congress has so declared. It asserts
"the principle, that as between creditors, 'equal-
"'ity is equity,' and that the race of diligence
"must cease, with respect to legal proceedings
"against a person who is insolvent, at the com-
"mencement of four months preceding the filing
"of the petition. This conclusion does not pre-
"vent the honest debtor seeking to work out from
"embarrassments from receiving present aid to
"that end, and from giving proper security for the
"aid received. But the one advancing money
"must take a present security other than that
"obtained through legal proceedings against an
"insolvent."

In the same way a confession of judgment, made out by a debtor and delivered to his creditor, is the highest possible evidence of the creditor's right to have a judgment, far higher than a creditor's bill, and conclusive, which the latter is not. And yet if the creditor does not actually enter his judgment until within the four months, he loses his lien, the case being practically the same as that of a judgment note just cited.

These instances bring out clearly the nature of a lien whose complete creation is deferred until the entry of judgment in the legal proceeding itself. In all these cases, and in the same way in a judgment creditor's action, the creditor, unlike a mortgagee, or a pledgee, or a vendor in possession, *can in no possible*

way complete his lien except by a judgment, and such a judgment is nullified and rendered unavailable by the Bankruptcy Act. That act imperatively declares that the judgment is *void*, and its provisions would be flagrantly violated if, under the guise of recognizing his lien, the Court allowed the creditor to enforce the judgment. Enforcement of the *judgment* is the one thing the act imperatively forbids, and that is all we are seeking to enjoin. We do not ask to enjoin the operation of whatever "lien" the judgment creditors may have obtained by filing their bill. Let them give that lien effect in whatever way is open to them, but we insist that they must not give it effect by a judgment, for that means is expressly prohibited by the Bankruptcy Act.

The act in effect provides that if a litigant applies to the Court to create and perfect a lien on equitable assets the legal title to which is in another, he must procure his adjudication more than four months before his debtor is made a bankrupt. If he does not procure his judgment until after the four months have begun to run, the judgment is absolutely void as against the representative of the creditors in bankruptcy, and it is too late for him to obtain his preference. The difference is fundamental between a judgment *effecting* a lien and a judgment *enforcing* a lien. One is an integral and inseparable constituent of the lien itself and the other is not.

We think it is not necessary to dwell upon this further, for it is clearly apparent that the lien of these judgment creditors, whatever it be, has its origin in the action of *Metcalf vs. Moses*. It would fall with the discontinuance of that action. It must fall with the legislative annulment of the judgment in that action.

This whole question was exhaustively considered by the Federal Courts many years ago, contemporaneously with the decision of the State Court in *Storm vs. Waddell*, on which the petitioners base their contention,

and the law finally settled as we have stated it and as it was applied below.

Re Coster, 1 New York Legal Observer, 53; s. c., *sub nom. Ex parte* Waddell, Fed. Cases, 17,027.

The opinion contains a careful review of all the cases but its length forbids insertion in our brief. The question at bar was the precise question there involved, and Judge BETTS sums up the discussion as follows:

> "I think, therefore, the judgment creditor in "this case, has no rightful authority over the "funds of the bankrupt, by means of this credit- "or's bill, which can withdraw them from distribu- "tion in subordination to the bankrupt act, and "appropriate them exclusively to his own debts.
>
> "Nothing more is presented by the petition and "motion for the decision of this court, than the "general question, whether filing a creditor's bill "in the state court of chancery constitutes a lien, "or other security, on the effects of the bankrupt, "valid by the laws of the State, and which, by "virtue of the last proviso of the 2d Section of "the Bankrupt Act prevents such effects passing "to the assignee of the bankrupt. I am of opin- "ion that it does not."
>
> Fed. Cases, 17,027, p. 1315.

2. Authorities cited by petitioners.

We will proceed therefore to examine the cases cited by the learned counsel for the petitioners, and it will be seen that what was actually decided in these cases was merely that the judgment creditor would, under certain circumstances, have priority of payment. It is not of great consequence whether the Judges call this right a "lien" or anything else. It is of the utmost consequence how they effectuate it and to what extent. Under the old acts relating to bankruptcy a judgment in a judgment creditor's action could be

entered at any time, even after bankruptcy. There was nothing in those acts to prevent it. There is an insurmountable obstacle under the present act.

Miller vs. Sherry, 69 U. S. (2 Wall.), 237, was a case involving a creditor's bill against real estate only, and, as a matter of fact, it was held that the particular bill in question did not create a lien on the real estate involved.

Storm vs. Waddell, 2 Sandf., Ch. 494, is discussed *infra*, (pp. 23, 24).

Freedman's Savings & Trust Co. vs. Earle, 110 U. S., 710, cited by the petitioners, merely reiterates the right of the creditor first filing his bill to priority of payment among creditors similarly situated. The reference to "bankruptcy" is a mere *dictum* by way of illustration, and was made, of course, without any reference to the present Bankruptcy Act, which was not then in existence.

In fact, the language cited by petitioners from this very case is as clear a statement as can be found of the nature of the lien as pointed out above; that it is inseparably connected from beginning to end with the specific legal proceeding which inaugurates it.

"*It is the execution first begun to be executed, unless* "*otherwise regulated by statute, which is entitled* "*to priority. The filing of the bill, in cases of equitable* "*execution, is the beginning of executing it.*" The italics are not ours.

The case of *Ex parte General Assignee*, Fed. Cases 5305, merely emphasizes our position that the judgment creditor, to perfect his lien, must procure the appointment of a Receiver. The Court there says (at p. 167):

"If the complainant, after filing his bill and obtain- "ing an injunction, fails to prosecute his suit with "proper diligence *and to obtain the appointment of a*

" *receiver*, the case of *Osborn vs. Heyer*, 2 Paige, 342, " is an authority for saying that his injunction will be " dissolved, and his lien superseded."

Clark vs. Rist, 3 McLean, 494, was a case under the Act of 1841; it merely stated that under that act the creditor in that case had a lien valid under the laws of Ohio, which was expressly saved by the Bankruptcy Act, and that for that reason an injunction should not issue.

Johnson, Assignee, vs. Rogers, 15 N. B. R., 1:

This was a decision of the United States District Court, in a district included in the Second Circuit, and is in flat contradiction to the original decision of the United States Circuit Court of Appeals in the case at bar. The considerations adduced in the Court below, and which have been made the ground of this decision, were not presented to the Court.

Kimberling vs. Hartly, 1 Fed. Rep., 571:

This was a case affecting real estate only, and the creditor's rights were saved by a *lis pendens*.

Sedgwick vs. Menck, 1 N. B. R., 675:

In that case the judgment creditor had not only filed his bill, but *had recovered judgment setting aside an assignment by one Beiser, and a Receiver had been appointed;* and nine years thereafter, Congress having meanwhile passed a Bankruptcy Act and Beiser having become a bankrupt, his assignee in bankruptcy applied by bill to the United States Circuit Court to compel the State Court receiver to turn over to the assignee the property of the bankrupt which had been included in the void assignment. It goes without saying that the application was denied. There is not the faintest resemblance to the circumstances in the case at bar.

Doyle vs. Heath, 47 Atlantic Rep., 213; *Taylor vs. Taylor*, 59 N. J. Equity, 86:

These decisions are in conflict with the original decision of the United States Circuit Court of Appeals in the case at bar; the considerations on which the latter decision was made were not presented to or discussed by the Courts in the two cases cited. The same is true of *Iselin vs. Goldstein*, 35 Misc., 489, the case decided at Special Term; nor does it appear in what way the question of the right of the trustee in bankruptcy to avoid the judgment creditor's preference arose in that case, nor even whether he was a party to the action, so far as the report shows; the suggestion of the trustee's rights came from the fraudulent debtor himself, to whom it was, of, course, unavailable.

Bank vs. Katz, 1 Am. Bank. Rep., 19, and *Reid vs. Cross*, 1 Am. Bank. Rep., 34, which simply follows the former case without further discussion, are destitute of any analysis or discussion of the principles involved and merely assume that the creditor filing his bill thereby obtains a lien good against the trustee in bankruptcy.

In *Storm vs. Waddell*, 2 Sandf. Ch., 494, *a Receiver had been appointed in the judgment creditor's action two weeks before the bankruptcy proceedings.* The Assistant Vice-Chancellor would apparently, however, have maintained the right of the judgment creditor as against the assignee in bankruptcy, even had there been no receiver. The authority of this case has been much weakened, in the New York Courts. It is carefully reviewed in *Stewart vs. Isidor*, 5 Abb. Pr. Rep., N. S., 68, and held inapplicable to a situation such as that at bar. There the Court says:

"The rule would, in my judgment, be more satisfac-
"tory if confined to cases where the disposition of the
"property sought to be reached had been restrained
"by injunction, or where the property itself had been

" placed in the hands of a receiver pending the " suit. Indeed, it was suggested in *Storm vs.* " *Waddell*, above cited, that 'in regard to chat- " 'tels subject to execution, the lien may de- " 'pend upon the receivership;' but in respect to " equitable interests and things in action, it was dis- " tinctly held that the lien was acquired by the mere " commencement of the suit. *The rule is not elsewhere* " *so broadly stated;* and I think that its application to " strict creditor's bills, where, upon filing the bill, an " injunction was taken out and served with the sub- " pœna to answer, is all that is fairly deducible from a " careful examination of the other cases cited. Where " the action is simply to set aside an alleged fraudu- " lent transfer, the lien, in the absence of any restraint " by injunction upon the fraudulent transferee, must " be purely theoretical. As a fact, it is dependent " upon success in the action " (5 Abb. Pr. Rep., N. S., at pp. 70, 71).

But, even if the opinion in *Storm vs. Waddell* were of unimpaired force in the State Courts of New York, it is avowedly in flat contradiction to the law laid down in the Federal Courts, and the learned Assistant Vice-Chancellor frankly acknowledges this fact.

" On the other hand, Judge BETTS, of the Southern " District of New York, a jurist of more experience " and certainly of no less learning than the other, and " whose judgments have always commanded the entire " respect and general assent of the bar, decided " directly to the contrary *(Re Coster*, 1 N. Y. Legal " Observer, 53*)*. The petition was filed by Coster " after the commencement of the creditor's suit, but " before the order for a receiver." (2 Sandf. Ch., p. 518).

Lynch vs. Johnson, 48 N. Y., 27, was decided by the temporary Commission of Appeals. The Commissioners were divided as to the grounds of the decision. Four of the Commissioners based their judgment on an application of *Storm vs. Waddell*

(supra) to receiverships in supplementary proceedings ; the other Commissioners voted to sustain the judgment on other grounds.

In *First Natl. Bank vs. Shuler*, 153 N. Y., 163, cited on behalf of the petitioners, the Court reversed a judgment setting aside fraudulent transfers of tangible assets on the ground that as the alleged fraudulent assignor had died *pendente lite*, and before the appointment of a receiver, and his executors had not been joined as defendants, the judgment was fatally defective. The part of the opinion quoted by counsel for the petitioners is merely a *dictum*, but even that part contains nothing opposed to our contention. It merely points out that a creditor, by filing his bill against equitable assets, acquires a lien, "*which* "*entitles him, in the successful event of the action, to* "*priority of payment thereout in preference to other* "*creditors* * * *." We do not dispute this; the trouble with the petitioners' case is that they have not had a "successful event of the action," because their attempted judgment was nullified by the Bankruptcy Act.

In *Roberts vs. A. & W. S. R. R. Co.*, 25 Barb., 662, cited by the learned counsel, a receiver had been appointed in a judgment creditor's suit. The Court says (at p. 663):

"The right of the complainant in a creditor's bill is "*sometimes called a lien*, but it gives an immediate "right to have a transfer of the defendant's property "made to a receiver. So that as between the re- "ceiver and a subsequent assignee, the title to the "property itself passes to the receiver, and from the "judgment debtor."

This is, in fact, a very clear statement of this right, which is "sometimes called a lien." It is a right *to have* a transfer of the defendant's property made to a receiver. This is no more *a transfer* than the *right to*

have a receivership of mortgaged property is *a receivership.*

In *Jeffres vs. Cochrane*, 47 Barb., 557, plaintiff was appointed receiver of a judgment debtor, and brought an action against the debtor and his wife to reach three notes which he alleged had been transferred by the debtor to his wife. During the pendency of the action the wife transferred one of the notes to her attorney. Plaintiff recovered judgment against the wife, and, not being able to satisfy his judgment, sued the attorney. Held, that the defendant (the attorney) having purchased *pendente lite with actual notice*, was bound by the judgment. On appeal this judgment was affirmed (48 N. Y., 671). Had the transferee taken without notice the Court would have held otherwise (*Matter of Clover*, 8 App. Div., 556; aff., 154 N. Y., 443). This fact shows the fallacy of calling the petitioners' right a "lien" in the true sense of the word.

Utica Insurance Company vs. Power, 3 Paige, 365:

The creditor's bill mentioned in that case was not brought to set aside fraudulent transfers, and the decision was merely that the rights of the subsequent assignee of the choses in action were no greater than the rights of the assignor, and it was pointed out that the assignee, the common law rule still prevailing, did not take the legal title. For the purposes of the case at bar, we do not dispute that the creditor filing his bill obtained a right superior to a subsequent assignee of the judgment debtor; nothing was said in the case cited, of the effect of an insuperable obstacle, such as the Bankruptcy Act, preventing a creditor from recovering an effective decree.

Macy vs. Jordan, 2 Denio, 570:

The statement of law given in petitioners' brief is taken from the reported syllabus in that case, but an examination of the case shows its only authority is found in

the language of JEWITT, J., whose opinion was only one of three opinions delivered; the report fails to show any concurrence in this opinion on the part of the rest of the Court, the vote of the Court being given simply on the question of reversing the order below. On this vote, Mr. Justice JEWITT was one of twenty-two voting for reversal. In the other opinions other grounds were assigned.

M'Dermutt vs. Strong, 4 Johnson's Chancery, 687:

There the Court merely holds that the right of a creditor who has filed his bill cannot be affected by a subsequent assignment by the debtor of his property. The question of the effect on the creditor's suit of such an obstacle as the Bankruptcy Act was not considered. As we said a moment ago, in discussing *Utica Insurance Company vs. Power*, for the purpose of this case, we do not question that the right obtained by filing a creditor's bill is superior to the right of a subsequent assignee from the judgment debtor.

Smith vs. ——, 4 Edwards' Chancery, 653:

The Chancellor merely states that he "understands" this rule to be conceded by the United States Courts. His attention was evidently not called to the *Coster* case and other Federal cases holding a contrary view.

Mandeville vs. Campbell, 45 App. Div., 512:

This was a case of real estate and the creditor's rights were saved by a *lis pendens*.

We have thus seen that the decisions relied on by the learned counsel for the petitioners, in nearly every instance, involved nothing but the rights of a creditor who had filed a bill, as against subsequent assignees from the debtor, or else they were cases of real estate, where the creditor had saved his rights by filing a *lis pendens*. We have seen that the New York Courts have themselves considered that the

rule should be confined to cases where the creditor obtained the appointment of a receiver, and in this connection we would refer to *Osborn vs. Heyer*, 2 Paige, 342, where the Chancellor says it is the duty of the complainant to obtain such an appointment. This has been reiterated and followed in *Bloodgood vs. Clark*, 4 Paige, 574, and *Monroe vs. Schermerhorn*, Clarke Chan. Rep., 214.

Of the cases thus cited by the petitioners which do not on the above analysis lose most of their worth as authorities available against the conclusions of the Courts below, there remain one or two in which it appears, as above stated, that the Courts did deny the right of the trustee in bankruptcy as against the complainant in the judgment creditor's action. Now, so far as these cases are concerned, they are in conflict with the original decision of the United States Circuit Court of Appeals in the case at bar, and on this point it is proper to set forth that opinion of the latter Court bearing upon the questions here involved. The Court says *(Re Lesser*, 5 Am. Bank. Rep., 320, at p. 323*)*:

"In the carefully stated opinion of the District "Judge (100 Fed. Rep., 433) upon the legal questions "involved in this appeal we concur, and our con- "clusions can be stated as follows:

"Inasmuch as the petition in bankruptcy was filed "on May 12, 1899, less than four months after the "entry of the decree of the Appellate Division which "directed payment to Metcalf Brothers & Co. of their "judgments at law, their inchoate lien upon the fund "of $27,000 in the hands of the receivers was dis- "charged and released.

"By Section 67 *f* all liens obtained through legal "proceedings within four months prior to the petition "in bankruptcy become void, and the property af- "fected by the judgment is released from the lien, but "it is said that the equitable lien of the Metcalfs was "obtained in December, 1896, when the creditors' bill

" was brought. It is true, that by the commencement " of a creditors' bill in equity, the complainants " acquire what is called an equitable lien upon the " choses in action and equitable assets of the debtor, " which simply means a right to a decree for priority " of payment, in case of success, over other creditors. " It is sometimes called an inchoate lien, or a con- " tingent lien, but it is not a right in, or a right to " hold a particular article of property. It is not " like the lien obtained by the attachment of personal " property in an action at law by virtue of which a " sheriff obtains either actual or constructive pos- " session of the property attached, and in such a case " the lien is not obtained by the judgment, but by the " attachment, and we are not now prepared to say that " if the judgment is rendered within four months after " the petition in bankruptcy is filed that the lien by " attachment is vacated.

" The so-called equitable lien under a creditors' bill " upon the choses in action and equitable assets of the " debtor is simply a right ' in the successful event of " ' the action to priority of payment thereout, in pre- " ' ference to other creditors, irrespective of the " ' priority of the respective judgments ' (*First National* " *Bank vs. Shuler*, 153 N. Y., 163, 171). If the Court " which rendered the decree had power to create " priority, the right to priority is perfected, but, if the " judgment, so far forth as it directs priority, becomes " waste paper, the lien is gone. In this case, it is not " necessary to say that the entire judgment is null and " void, because the judgment was to the effect that the " transfers and assignments of personal property and " the receiverships were fraudulent and void, and this " part of the judgment is not affected by the Bankrupt " Act. The lien, however, which was created by the " judgment has become discharged by the provisions " of Section 67, and the Metcalfs cannot have the " benefit of the decree which directs payment to them " of their judgments in the actions at law because the

" preference created by the decree was made null by " the Bankrupt Act."

The opinions of the State Courts and of the inferior Federal Courts, are, we submit, overcome, so far as the mere weight of authority goes, by the opinions in the Courts below. But eliminating for the moment the latter, in considering the effect of the cases cited by the petitioners in which the question of bankruptcy was involved, we are brought to the broader view of the rule of *stare decisis* in the light of which this Court has more than once had occasion to make its rulings. In the Income Tax cases, it will be remembered, this Court was confronted by former decisions sustaining the validity of income tax laws, and involving a consideration of exactly the same portions of the Constitution that were involved in the cases before the Court. But it appeared that in the former cases there were aspects of the constitutional questions which had not been presented to the Court, and, therefore, in the later cases the Court could not, in view of its duties and responsibilities as a Court of last resort, shut its eyes to those aspects and those features of the questions involved which were then for the first time presented, even though a consideration of such aspects and such features might then lead to conclusions different from those reached by the Court in the old cases. The science of jurisprudence would be a lifeless and unprogressive one if there were no historic growth or development possible. Now, in the few cases cited by the petitioners, in which the rights of a creditor who had filed his bill were held to be superior to the right of the trustee in bankruptcy of a debtor whose petition in bankruptcy was filed within four months after the judgment in the creditor's action was obtained, there is no discussion of the nature of the lien from the point of view urged in the Courts below and taken by them. In all those cases it was assumed that the creditor *had* a *lien*, nor was any consideration taken of the inchoate and incomplete nature of the lien which

was so fully and carefully examined by the District Court and the Circuit Court of Appeals in the case at bar. Had the decisions in question been made by this tribunal, there might be some ground for urging a rigid application of the rule of *stare decisis*; but this Court having never had occasion to make an exact and exhaustive determination of the precise questions brought into being by the particular language of the present Bankruptcy Act, it will now on well-settled principles approach that question unembarrassed and unbound by the few decisions of the Rhode Island, New Jersey and Illinois state tribunals. These latter decisions will receive due weight, but they are in no sense binding decisions, nor are they effective in framing a general rule of law to which this Court should, on general principles of comity, yield, and they are in flat contradiction to the original decision of the Circuit Court of Appeals in this case. And we submit that that decision follows as a logical necessity from an analysis of the nature of the lien as it has been viewed and applied by Courts of equity.

3. The Cases on Attachment.

The learned counsel for the petitioners maintains that the validity of an attachment lien obtained more than four months prior to the filing of the petition in bankruptcy has been recognized as valid against the estate of the bankrupt, to support which he cites numerous cases arising under the former bankruptcy acts. We can put aside the question of the lien of an attachment, inasmuch as that question does not arise in the case at bar.

II.

All the property was tangible assets; consequently in no event could any lien have been obtained.

And it appears, from the certificate in this case that all the property affected by the alleged lien is in its nature subject to execution; there is nothing in the record to show that there were any intangible assets, and no presumption exists to that effect.

The property in question may be divided for the sake of clearness into the following classes:

I. Accounts transferred by Lesser Brothers to transferees not made parties defendant in the Metcalf action, or who were not served.

II. The real estate of Tobias and Israel Lesser transferred to Lilianthal.

III. Property in the hands of the Receivers, Franklin and Moses. This is of two kinds:

(a) Goods turned over to creditors under the order of November 23, 1896.

(b) Proceeds of goods sold by the Receivers.

IV. The outstanding accounts of Lesser Brothers assigned to transferees who are made parties defendant in the Metcalf action and who were served.

Class I.

No claim is made by the petitioners to the assets transferred included under Class I.

CLASS II.

As to the real property transferred to Lilianthal (Class II.), the Court below decided against us. We have not appealed from the order and, therefore, raise no question as to the correctness of this ruling.

CLASS III.

The property falling under each of the two subdivisions of Class III. must be separately considered.

(a)

No lien can be claimed by the petitioners on the assets included in subdivision (*a*)—*viz.*, the merchandise which was delivered over to the creditors and for which they gave bonds; that was property subject to execution.

(b)

As to subdivision (*b*) of Class III. it must be remembered that the judgment creditor's rights obtained by filing his bill are nothing more at the most than a *lis pendens* as to the property sought to be reached. This *lis pendens* operates only on the choses in action and the equitable assets of the debtor; it does not attach to property which is in its nature subject to execution. And this is true, although it may not be as a matter of fact possible to reach it by execution.

First National Bank vs. Shuler, 153 N. Y., 163, at p. 172.

The mere fact that it is in the hands of a fraudulent assignee or receiver makes no difference, because it remains property in its nature subject to execution.

We therefore contend that the property falling under subdivision (*b*) of Class III. is not subject to any

lien such as the petitioners claim, for that was also property in its nature subject to execution.

The judgment debtors had merchandise and accounts. The accounts were *choses in action*, that is, equitable assets; but the merchandise was clearly not of that nature. It passed on to the Receivers and from them to certain purchasers, and always remained property in its nature subject to execution. The *lis pendens* to which the commencement of the judgment creditors' action was equivalent was operative only as to the equitable assets belonging to the debtors, not to property of the debtors subject to execution and which became equitable assets in the hands of their transferees, the Receivers (see Nature of Judgment Creditor's Action, Bishop on "Insolvent Debtors," p. 340, *et seq*). Moreover, this property was converted into equitable assets, if at all, in the Receivers' hands at the instance of the Court, in an action to which the petitioners were parties, and by that order the proceeds were to stand in place of the original goods. A court of equity looks to substance and not to form, and the proceeds in the hands of the Receivers should be treated, as to the petitioners, as though they were the original goods. The only change of form which they had undergone was the result of an order of the Court, made *in invitum* as to the Lessers, and made for no other purpose than to serve the convenience of the defendants in that action, including these petitioners.

None of the cases cited by counsel for petitioners holds that tangible assets—tangible at the time the creditor's bill is filed—lose their character and become equitable assets as against conflicting claimants by reason of their sale under order of the Court.

In *Lawrence vs. Bank of the Republic*, 35 N. Y., 320, the only property was a bank account. There was no opportunity for any question of conversion.

Thurber vs. Blanck, 50 N. Y., 80, is the leading case on the proposition that a creditor's bill to reach equitable assets must be founded on a judgment, and that an attachment will not suffice. There was nothing but equitable assets involved, and there was no question of conversion.

Braem vs. M. N. Bank, 127 N. Y., 508:

We do not see the application of the principles of this case to the present situation.

CLASS IV.

As to the property falling under Class IV., that is not brought into question, inasmuch as the Appellate Division dismissed the action as to Adler, the transferee of accounts.

Thus we see that so far as this case is concerned the consideration of the priority obtained by filing a creditor's bill against intangible assets or property not in its nature subject to execution, is entirely an academic one. And it is equally clear that the third question "Did Metcalf "Brothers & Co., by the commencement of their "creditors' action acquire a lien on the property of "the bankrupts superior to the title of the trustee "thereto?" must be answered in the negative. Of course they did not by the commencement of their action acquire a lien, and it has never been contended that a judgment creditor, by the commencement of an action, acquired a lien against tangible assets.

The cases of *Yeatman vs. Savings Institution*, 95 U. S., 764, and *Stewart vs. Platt*, 101 U. S., 731, are discussed *infra* (p. 42).

We are thus brought to the consideration of the fourth and fifth questions certified.

III.

The inchoate lien was not perfected until the four months' period had begun to run.

The fourth question is as follows:

IF THE LIEN ACQUIRED BY THE COMMENCEMENT OF THE CREDITORS' ACTION WAS INCHOATE MERELY, WAS IT PERFECTED BY A JUDGMENT OBTAINED MORE THAN FOUR MONTHS PRIOR TO THE FILING OF THE PETITION OF THE LESSERS IN BANKRUPTCY WITHIN THE MEANING OF THE PROVISIONS OF THE ACT OF CONGRESS OF JULY 1, 1898, KNOWN AS THE BANKRUPTCY ACT ?

Lesser Brothers filed their petition in bankruptcy on the 12th day of May, 1899. A judgment or lien which would not be invalidated by the Act would have had to be entered or obtained against them before the 12th day of January, 1899. The only judgment appearing in the certificate that was so entered was the judgment entered on the decision of Justice RUSSELL, on the 6th day of April, 1898. That judgment did not perfect the inchoate lien obtained by Metcalf Brothers & Company, for, as appears in the certificate, the judgment determined that the property should be administered by the Receivers for the benefit of *all* the creditors of the co-partnership, and that Metcalf Brothers & Company *should not be allowed to levy an equitable execution on the assets of the debtors.* So far then as the judgment of Justice RUSSELL is concerned, that judgment gave Metcalf Brothers & Company no lien superior to

that of the creditors at large ; it was not until the subsequent judgment of the Appellate Division that they obtained a preference over the other creditors. To say that the judgment of Justice RUSSELL perfected the inchoate lien of the petitioners is paradoxical ; it practically turned them out of court ; it was they who appealed therefrom to the Appellate Division. Is it not convincing disproof of any saving grace in that judgment that, had they not successfully appealed therefrom, the question of their priority would not be before this Court ?

It should be noted that, in the State of New York, the date of the judgment is the date of its actual entry, and that the rule which prevails in some States, that the judgment for some purposes dates back to the first day of the Term, has no application to the case at bar.

It should be borne in mind that it is only the *judgment* in the judgment creditors' action which makes this so-called lien effective, and the Bankruptcy Act of 1898 expressly states (Sec. 67 *f*) that such a judgment obtained within the four months' period prior to the filing of the petition shall be void as against the trustee. It is not, therefore, the rights obtained by the service of their summons on which the petitioners in reality rely. They ask to be allowed to appropriate the fruits of their action attempted to be obtained by their judgment.

Since, then, the judgment of April 6th, 1898, failed to perfect any inchoate lien obtained by the commencement of the action, is there in the certificate mention of any other judgment which falls without the scope of the four months' period ? It was contended by the learned counsel for the petitioners that when the Appellate Division made an order or memorandum or direction to the Clerk, bearing date December 30, 1898, authorizing the plaintiffs in the *Metcalf* action to enter a judgment perfecting the inchoate lien, that by such

" memorandum," as our Court of Appeals has termed it, the plaintiffs actually did obtain a judgment.

It is, of course, difficult for this Court to determine the effect of a particular memorandum, entry, decree or judgment of a Court without having before it the actual instrument which it is considering. The language of the certificate itself, however, negatives any possible construction that this memorandum of December 30, 1898, was a *judgment*. Inasmuch as it is stated in the certificate that the Appellate Division still had before it the case for reargument, it must be presumed that it had before it the return, and that it had not yet parted with the case nor finally determined it. The particular language of the certificate states that " the delay in " the entry of final judgment was caused by vari- " ous motions before the Appellate Division for re- " argument." It is evident, therefore, that no judgment *could* have been entered up to the 31st day of January, 1899, perfecting the inchoate lien of Metcalf Brothers & Company.

The cases cited by the learned counsel to support his proposition that the judgment obtained by the petitioners should date from the authorization of the Appellate Court to enter a judgment and not from the time that the judgment was entered, do not sustain his contention. In not one of these cases was time of importance. In not one of these cases did the question of conflicting liens arise. In each case it was simply a question of whether or not the rights of a party had or had not been judicially considered and decided upon. That is the construction to be put upon the passages cited by the learned counsel from Black on " Judgments." Freeman in his work on Judgments, says, (Vol. I., § 37): " While " the entry is not the judgment, its absence tends " strongly to indicate that no judgment exists, and in " doubtful cases may be sufficient to sustain the issue " that whatever has been done has been but pre- " liminary to judgment. *Thus a memorandum*

" *handed down by an appellate court, of its decision*
" *on appeal, is not a judgment, but simply authority*
" *to enter one (Knapp vs. Roche,* 82 N. Y., 366).*
" An entry made by a judge in his calendar is not the
" judgment in the case. It is intended merely for the
" guidance of the clerk in entering orders and judg-
" ments, and cannot prevent the judge from sub-
" sequently signing and the clerk enrolling the final
" judgment *(Traer vs. Whitman,* 56 Iowa, 443*)*. The
" entry, though without it the judgment be conceded
" to exist, may be important in other respects besides
" that of establishing the terms of the judgment, as
" where, under the statute of a state, a judgment can-
" not be docketed so as to constitute a lien until after
" its actual entry *(Rockwood vs. Davenport,* 37 Minn.,
" 533; *Eastham vs. Sallis,* 60 Tex., 576*)*, or where
" judgments are in certain cases required to be recorded
" before they can affect innocent purchasers or en-
" cumbrancers *(Witter vs. Dudley,* 42 Ala., 616*)*."

And, again,

§ 39. * * * " But the distinction between a de-
" cree and an order for a decree must not be over-
" looked. 'No decree can be said to be entered of
" record until it is formally drawn out and filed by the
" clerk. A mere order for a decree, before it is ex-
" tended in due form and in apt and technical language,
" cannot be held to be a complete record of the judg-
" ment of the Court'" *(Thompson vs. Goulding,* 5 Allen, 81; *Gilpatrick vs. Glidden,* 82 Me., 201)."

The very fact that it is the judgment of January 31st, 1899, under which the petitioners would proceed to enforce their perfected lien, would indicate that their attempt to rely on the memorandum from the

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* What was there called a " memorandum " was precisely the same kind of instrument as the memorandum of December, 1898, of the Appellate Division. It was the usual order of affirmance, familiar to the New York practice.

Appellate Division of December 30th, 1898, is simply an afterthought.

The question under consideration in the certificate speaks of a "judgment." The only judgment that can legally be entered in the State of New York was the judgment entered pursuant to the authority therefor contained in the memorandum or order which is now said to be "a judgment." What constitutes a judgment is fully specified in the New York Code of Civil Procedure, Section 1355 :

> " * * * The *order* made upon the appeal must be entered in the office of the clerk of the Appellate Division, and a certified copy thereof with the original case or papers upon which the appeal was heard, filed as provided in Section 1353, must be transmitted by the clerk upon payment of his fees, to the clerk of the county where the judgment or order appealed from was entered, and upon such certified copy of the order and the case or papers upon which the appeal was heard, the County Clerk shall enter the *judgment* in his office."

And even the judgment entered upon such direction from the Appellate Court, the Code prescribes is not a complete judgment until it has been signed by the clerk and filed in his office.

> " Every interlocutory judgment or final judgment shall be signed by the clerk and filed in his office, *and such signing and filing shall constitute the entry of the judgment.*" (Section 1236).

The order of affirmance now relied on by the lienors is simply the formal memorandum, long in use as part of the machinery for procuring the judgment; it is what the Court of Appeals calls " simply the authority " for an entry of the judgment * * * merely a " memorandum of the decision of the General Term on " the appeal."

Its effect was fully and exhaustively considered in *Knapp vs. Roche*, 82 N. Y., 366. The instrument there under discussion was precisely similar to the instrument mentioned in the certificate; it began in the same way "At a General Term" *etc.*, followed by a formal recital of the proceedings and a formal modification of the judgment below and ending with the signature of one of the Justices. This, says the Court, "is not the judgment, but simply the "authority for an entry of the judgment *(Eno vs.* "*Crooke*, 6 Howard Pr., 462*)*. Waiving, therefore, all "questions as to the sufficiency of the papers on file "to constitute the basis of a judgment-roll on affirm-"ance, it is sufficient to say that no judgment of "affirmance has as yet been entered, for the reason "that what is called the judgment signed by Judge "SPEIR is merely a memorandum of the decision of "the General Term on the appeal. On filing that "decision a formal judgment of affirmance should "have been prepared which should have been entered "in the judgment-book and then been attested by the "signature of the clerk" (82 N. Y., at p. 369).

And it has been pointed out that the decision of the Court is not the judgment required by the Code, Section 1236.

Schenectady Plank Road Co. vs. Thatcher,
6 Howard Pr., 226.

The fifth question propounded to this Court is:

> IF THE LIEN ACQUIRED BY THE COMMENCEMENT OF THE CREDITORS' ACTION WAS INCHOATE MERELY, WAS THE JUDGMENT IN THE CREDITORS' ACTION, WHENEVER OBTAINED, ONE WHICH IS AVOIDED BY ANY OF THE PROVISIONS OF THE ACT OF CONGRESS OF JULY 1, 1898, KNOWN AS THE BANKRUPTCY ACT?

Under the provisions of the old act, the question before the Court could never have arisen.

As was pointed out in *Yeatman vs. Savings Institution*, 95 U. S., 764, the assignee in bankruptcy, under the old act, took nothing more than the rights of the bankrupt in the estate. Former Bankruptcy Acts contained no sweeping provisions invalidating preferences obtained in legal proceedings against the bankrupt before the adjudication. Whatever equity a debtor might have in his property passed to his assignee in bankruptcy, nothing more. The learned counsel for the petitioners relies much on the *Yeatman* case as an authority to support his contentions. A reading of the case, however, clearly shows that the decision in that case could in no way be held applicable to the case at bar. The Court says of the Act of 1867, at p. 766:

"The established rule is, that, except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupts."

So in *Stewart vs. Platt*, 101 U. S., 731, the Court held that the assignee had no greater rights against a holder of an unrecorded mortgage than his assignor, the bankrupt, had. But the new Bankruptcy Act introduces an entirely new principle; it provides that within four months prior to the filing of the petition in bankruptcy no creditor may by legal proceedings obtain a preference in the distribution of the estate of the bankrupt. So that, even though an action be begun more than four months prior, if the judgment be not obtained before the four months' period begins to run, the judgment itself falls.

The petitioners contend that their judgment was obtained in 1896 and that the particular clause in

question can in no way affect them. But what meaning then could be given to Section 67 *f*? Of course by the entry of their money judgment in 1896, the petitioners obtained no preference. If by that judgment they had obtained a preference, the Act could in no way affect them. Had they levied execution on the assets before the four months' period began they would have been safe against the subsequent title of the trustee in bankruptcy. Now, whether the subsequent judgment which they obtained in their judgment creditors' action within four months prior to the filing of the petition in bankruptcy was a decree *against the estate* of the bankrupts or one *in personam* merely, is for the purpose of the construction of the section absolutely immaterial. It would be a strange construction of the section which, where a bankrupt had conveyed his property to a third person, would allow a creditor to obtain satisfaction out of that property in the hands of the third person, yet which would prevent the same creditor from obtaining satisfaction out of the property in the hands of the debtor. It is the preference which the act condemns; in its terms it is broad enough to cover every conceivable way of obtaining that preference through legal proceedings, and whether by levy under execution, whether by judgment, whether by attachment or other lien, the preference obtained is void as against the trustee in bankruptcy.

The bankruptcy bill, as originally reported (Senate Bill, 1035). is printed in full in the "Congressional Record," Vol. 31, Part 2, pages 1778–84. In the original bill Section 67 consisted of four subdivisions, *a*, *b*, *c* and *d*, substantially in the present form of the subdivisions bearing the same letters. In the bill as finally reported by the Conference Committee ("Congressional Record," Vol. 31, Part 7, pp. 5960–5966) this Section 67 is enlarged by the addition of subdivision *(f)*, providing that all levies, judgments, attachments or other liens obtained through legal proceedings, *etc.*,

against the bankrupt shall be void if obtained within four months prior to the filing of the petition.

The sweeping character of this annihilation of preferences is familiar to this Court, by reason of the number and variety of instances in which such preferences have been adjudged to be void.

In the Conference Committee's report (§ XIX) read in Congress on the eve of the passage of the bill, it is pointed out ("Congressional Record," Vol. 31, Part 7, p. 6428) that, "By an addition to Section 67 [this very subdivision *(f)* now under consideration], "which relates to liens, the bill has been materially "strengthened. All levies, judgments, attachments, "and other liens obtained through legal proceed- "ings against a person who is insolvent, within the four "months before a petition is filed, are declared null "and void in case he is adjudged a bankrupt. *Bona* "*fide* purchasers for value on a sale under such a lien, "*etc.*, are fully protected. *In effect, liens of any descrip-* "*tion obtained upon the property of a bankrupt within* "*four months of the adjudication are made null and* "*void*, except when given for a new and fair considera- "tion to a person who has no notice of the insolvency "or no reasonable cause for inquiry."

The intention of Congress is thus manifest to provide that a person dealing with one who may afterwards become a bankrupt shall be protected, as he should be protected, that is, so far as he actually advances any money; but that as to all other persons, including all existing creditors, the race of diligence shall cease and all creditors shall stand equal before the law as of and from a date four months prior to the filing of the petition in bankruptcy. It would seem that language could no further go to make this intention of Congress absolutely clear and unmistakable.

The construction contended for by the lienors would emasculate this provision of the act; indeed, in one breath the lienors say their judgment is saved from the provisions of the act, because it is not a judgment

against the bankrupt, and in the same breath they say that their judgment is saved, because it is simply the final incident of a judgment originally taken against the bankrupt. In other words, it is saved because it is *not* obtained against the bankrupt and it is saved over again, because it *is* obtained against the bankrupt.

The Congressional debates show how this four months' avoidance of preferences was strenuously insisted upon from the beginning, how it was recognized by the minority in Congress, and how bitterly it was fought. For example, it was urged in opposition to the bill, that it was a sectional measure, and that it facilitated oppression on the part of Eastern merchants against small tradesmen in the West and South; that it was easy for such creditors to force a man into bankruptcy; and the reply was that it rather protected the local merchant from the dangers to which he was subject under the State insolvent laws, because it removed the incentive to his creditors to resort to drastic measures, such as attachment, inasmuch as such drastic measures would yield nothing to the creditor pursuing them, because they would be followed by the debtor going into bankruptcy, and the consequent elimination of the preference obtained.

Thus we see the reason for the "strengthening" provision of subdivision *f*, which the Conference Committee found it necessary to add to section 67 in in order to secure the passage of the bill. Congress by most broad and comprehensive language clearly intended to annihilate every preference obtained within four months, except such as was based upon actual advance of money.

IV.

The Court had jurisdiction to make the order.

We have shown therefore that what Metcalf Brothers & Company were trying to do was a clear violation of the provisions of the Bankruptcy Act. They were trying to appropriate assets that had passed to the trustee in bankruptcy, and they were trying to appropriate them under a lien declared void by the provisions of the act; and under the second question certified to this Court the inquiry is whether the District could, by summary proceedings, restrain them from so doing.

The question is as follows:

IF SAID COURT HAD JURISDICTION TO RESTRAIN METCALF BROTHERS & CO. FROM RECEIVING THE FUND IN QUESTION, COULD SUCH JURISDICTION BE EXERCISED BY SUMMARY PROCEEDINGS?

On the application of the trustee in bankruptcy an order issued out of the District Court directing the petitioners to show cause why they should not be enjoined from attempting to interfere with the estate of the bankrupts. The order granted a temporary injunction until the decision of the motion. Pursuant to agreement of counsel, the order was not personally served on the petitioners, but on their attorneys. On the return day the petitioners appeared specially, objecting to the jurisdiction of the Court, *but the petitioners argued the motion on the merits. They submitted an affidavit in opposition to the application of the trustee in bankruptcy*, and would seem thereby to have waived the question of whether or

not the District Court had acquired jurisdiction over them.*

However, whether they waived the question or not, the District Court did acquire jurisdiction over them. They were attempting to interfere with the estate of the bankrupts, and it was within the power of the Court of Bankruptcy to prevent such interference.

It needs no more than a brief examination of the second question to show that a negative answer thereto is absolutely precluded. For the question *assumes* that *jurisdiction* to grant the relief given existed in the District Court, and thus the question of jurisdiction generally has been left behind when we come to this question. The inquiry is, *assuming* that the District Court had jurisdiction, could such jurisdiction be exercised by summary proceedings? Now to say that the District Court had jurisdiction is to say that it might in some way exercise jurisdiction. Anything less would involve an absurdity. To say that there is no way in which a Court may exercise jurisdiction is to say that it has no jurisdiction; and, conversely, to say that it has jurisdiction, is simply another way of saying that it may exercise jurisdiction.

Now, so far as bankruptcy controversies and proceedings, (and, in fact, all such matters involving civil rights) are concerned there are, to use the classification of the petitioners, which is a correct and exhaustive classification, two ways, and two only, open to the Court. A court having jurisdiction of any such controversy (which by the second question the District

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* It is not contended that by appearing and arguing the motion on the merits the petitioners waived any objection to the jurisdiction of the Court to act in the premises or to exert its process over them; but they waived the necessity of formal service of the motion papers. But under the form of the second question *the Court assumes that the District Court had jurisdiction*, and the only inquiry is whether it might be exercised by summary proceedings.

Court is ASSUMED to have) may proceed and MUST proceed:

Either (1) by plenary suit; or (2) by summary proceedings.

This Court has decided in *Bardes vs. Hawarden Bank*, 178 U. S., 524, as the petitioners correctly maintain, that *the District Courts have no jurisdiction under the Bankruptcy Act to proceed by plenary suit.**

Therefore, assuming that the District Court has jurisdiction, as the second question does assume, it is manifest that such jurisdiction not only "*can* be exercised by summary proceedings," but that it *must* be so exercised, and can be exercised in no other way.†

Under the *Bardes* case, therefore, an affirmative answer must necessarily be given to the second question. The petitioners' real contention would have been expressed in some such question as this: "Inasmuch as in the case at bar the jurisdiction of the District Court could be exercised only by summary proceedings, should not that Court have *declined to exercise such jurisdiction* and have sent the litigants to some other forum where their rights might be adjudicated in a plenary suit?"

But when we put the question in this form the answer is clear. *This* court will not certify that the District Court should have declined to exercise jurisdiction: because;

In the first place, the exercise of jurisdiction by way of summary proceedings was the natural, historic and proper way of exercising jurisdiction in injunction proceedings.

(*a*) As uniformly exercised under this and former bankruptcy acts, *e. g.*, *Re Wallace*, 2 Bank. Reg., 52, quoted *infra*, p. 55.

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*Except in cases where the proposed defendants *consent* to the exercise of the jurisdiction (*Bardes vs. Hawarden Bank*, 178 U. S., 524, 536), which is not the case here.

†Except in the case specified in the preceding foot-note.

(*b*) As expressly authorized by U. S. R. S., Sec. 720; Bankruptcy Act. Sec. 2. Subd. 15; and Clause 3 of the Twelfth General Order in Bankruptcy, all quoted *infra*, p. 57, and all quoted and followed by this Court in *White vs. Schloerb*, 178 U. S., 542, 547.

And in the second place, because it was for the District Court, having *jurisdiction* to act, to determine whether or not it would act, and this Court will not, on a *jurisdictional* inquiry, overrule its determination.*

Disregarding this inevitable corollary flowing from the principles laid down in the case on which he himself chiefly relies, the learned counsel for the petitioners cites numerous authorities to show that the District Court could not by summary proceedings in this manner exercise jurisdiction over the petitioners, and that by reason of its wrongful act in attempting to exercise such jurisdiction the petitioners' rights were "summarily and finally tried on affidavits!" But the cases cited lead to no such conclusion, but to the contrary rather.

White vs. Schloerb, 178 U. S., 542, sustains the ruling of the Court below on the question of jurisdiction. The learned counsel cites it as sustaining his position. So far from holding that the United States District Court has no jurisdiction in bankruptcy to enjoin proceedings in State Courts, or that such injunctions may not be issued "summarily and finally on affidavits," this is a case where *such an injunction was issued and its issuance affirmed by this Court.*

None of the other cases relied on by the petitioners shakes the principle laid down by the District Court

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* Of course this does not prevent a review of the petitioners' contention that the determination of the District Court on the questions of *law* involved in the controversy was erroneous; that question is raised by the third, fourth and fifth questions certified; but it clearly prevents a negative answer to the second question certified.

" that it is manifest from the terms of the Act that the " Court has jurisdiction to restrain any person from " illegally possessing himself of assets and depleting the " estate, contrary to the terms of the Act, and in fraud " of the rights of other creditors " (100 Fed. Rep., at " p. 438).

Louisville Trust Company vs. Comingor, 184 U. S., ; 22 U. S. Sup. Ct. Rep., 293, relied on by the petitioners, was a case in which the District Court had attempted to decide the merits of a controversy between a general assignee of the bankrupt and the trustee in bankruptcy. The Referee reported that the assignee was withholding certain moneys as compensation but that his claim was for services which had been of no value, and the Court directed him to pay the trustee in bankruptcy a large sum of money. Any proceeding for this kind of relief was of course in the nature of a plenary suit, whether it was so called or not, and under the decision in *Bardes vs. Hawarden Bank*, no such suit could be entertained by the District Court. We have obtained no such relief nor asked for it. If the mere obtaining of an injunction were sufficient to make the proceeding a plenary suit, the Court could not have decided the case of *White vs. Schloerb* as it did, nor could it have decided *Mueller vs. Nugent*, 184 U. S., ; 22 U. S. Sup. Ct. Rep., 269, as it did.

In the case of *Bryan vs. Bernheimer*, 181 U. S., 188, the Court went even further than merely granting an injunction, and approved the order of the District Court directing the marshal to take forcible possession of the property in the hands of an adverse claimant. The Court states (at p. 197) that its remark in *Bardes vs. Hawarden Bank* that the power conferred on the Court " can hardly be considered as au- " thorizing the forcible seizure of such property in the " possession of an adverse claimant " was an inadvertence, and that the question before it in the *Bardes* case " *related exclusively to jurisdiction of a suit by the trustee* " after his appointment." And this case of *Bryan vs. Bernheimer* has been followed by the District Courts

as showing that the District Court had jurisdiction to make the injunction order in *the particular case at bar (In re McCartney*, 109 Fed. Rep., 621*)*.

Bardes vs. Hawarden Bank, 178 U. S., 524 :

All that was decided in that case, so far as the question of jurisdiction is concerned, was that the grant of jurisdiction to the Federal Courts in *suits* brought by trustees in bankruptcy to set aside fraudulent transfers, was, so far as the Bankruptcy Act was involved, confined to cases where the defendant consented thereto, and that this limitation was applicable to such suits when jurisdiction was claimed under Section 2, subdivision 7, authorizing the District Courts " to * * * determine controversies, * * * " except as herein otherwise provided." If we were bringing an action in the Federal Court against the Lessers' fraudulent transferees without their consent, this case would be an authority against us. We are bringing no such action, nor are we making any claim under Section 2, subdivision 7. What the District Court gave us was an order under the grant of jurisdiction contained in Section 2, subdivision 15, to

> " make such orders, issue such process, and enter
> " such judgments, in addition to those specifically
> " provided for, as may be necessary for the en-
> " forcement of the provisions of this Act."

Section 67 is one of " the provisions of this Act." If the petitioners' alleged " lien " falls within the prescription embodied in that section, and if they are proceeding to enforce it, and if, in the absence of restraint from the District Court, nothing can prevent them from enforcing it, then it seems a waste of words to point out that a restraining order is necessary to enforce this provision of the Act, and the District Court emphatically had jurisdiction to determine the question whether the petititioners'

alleged " lien " was within the prohibited class, and whether, in consequence, it had the power to make such an order. If it decided the question as to the existence of petitioners' lien incorrectly, then the injunction was unjustified ; the injunction was improper, not for want of jurisdiction, but on the merits. The correctness of its decision as to the alleged lien is the main question on this review.

The only questions are : Do the facts warrant it ? Is the lien void ?

And the authorities that we have discussed show that these questions must be answered in the affirmative.

In the *Bardes* case it was finally decided, setting at rest many conflicting decisions in the Courts below, that the District Courts could not, except with the defendant's consent, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property made by the bankrupt to third persons before the institution of bankruptcy proceedings. For a clear understanding of this case and of the case of *White vs. Schlocrb*, 178 U. S., 542, decided simultaneously therewith, it is convenient to refer again to Section 2 of the Bankruptcy Act. That section vests in the courts of bankruptcy—in other words, in the United States District Courts—a jurisdiction the enumeration of which extends over 19 subdivisions. Two only of these subdivisions are necessary to be considered here ; these two subdivisions authorize the District Court to act as follows :

" (7) Cause the estates of bankrupts to be col-
" lected, reduced to money and distributed, and *de-*
" *termine controversies* in relation thereto, except as
" herein otherwise provided."

" (15) Make such orders, issue such process and en-
" ter such judgments, in addition to those specifically
" provided for, as may be necessary for the enforce-
" ment of the provisions of this Act."

It is not necessary to go over in detail all the ground

covered by the exhaustive opinion in *Burdes vs. Hawarden Bank*; the opinion was written by Mr. Justice GRAY and was concurred in by all the Court, and it has since that time been so frequently discussed that the Court is quite familiar with it. Suffice it to say that the Court points out the distinction between *proceedings in bankruptcy* and independent suits between assignees in bankruptcy and adverse claimants. Under the Act of 1867 the distinction between proceedings in bankruptcy, properly so-called, and independent suits at law or in equity between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared (*Ibid.*, p. 533). The Court first points out that under the former act the concurrent jurisdiction of the State Courts over such *suits* was maintained. In that case the appellant relied upon the language of subdivision (7) above quoted, authorizing the District Courts, sitting as Courts of Bankruptcy, "to determine controversies in relation "thereto" and maintained that suits are "controversies;" this claim was met by pointing out that this grant of jurisdiction is controlled and limited by the concluding words of the clause "except as herein otherwise provided." These latter words, says the Court, "evidently refer to Section 23 of the Act," and Section 23 limits the jurisdiction of the U. S. Circuit Courts to cases where suits might have been there prosecuted had there been no bankruptcy, limits it, in other words, to cases involving more than $2,000 and having the requisite diversity of citizenship, and limits the jurisdiction of the U. S. District Courts over such suits to cases where the defendant consents to the exercise of such jurisdiction (*Ibid.*, 535, 536). Clearly then a trustee, unless he were a citizen of a different State from the proposed defendants, could not maintain a plenary action in the U. S. Circuit Court, and could not without a defendant's consent maintain a plenary action in the U. S. District Court. Were we attempting to maintain a plenary

action, relief would necessarily have been denied us; a plenary suit in equity would manifestly not be maintainable in the District Court. As this Court says in *Bardes vs. Hawarden Bank*, the section (§ 2) nowhere mentions civil actions at law, or plenary suits in equity; and no intention to vest the Courts of Bankruptcy with jurisisdiction to entertain such *actions and suits* can reasonably be inferred from the grant of the incidental powers in subdivision 15 to make orders, issue process and enter judgments necessary for the enforcement of the provisions of this act (*Ibid.*, 535). But the same determination that excludes from the jurisdiction of the District Courts the maintenance of plenary suits in equity leaves to the District Courts the unquestioned jurisdiction in "proceedings in bankruptcy," the distinction being retained with unabated vigor as in the Act of 1867. And in such proceedings in bankruptcy the District Court has power "to make such orders, issue such process, and "enter such judgments, * * * as may be nec- "essary for the enforcement of the provisions of this "Act." If the District Court did not have such power, the Bankruptcy Act would be a nullity.

And when has it ever been heard that a mere restraining order postulated a "plenary suit," or needed a plenary suit to give it vitality? Restraining orders have been granted as incidents of proceedings in bankruptcy ever since there have been such things as proceedings in bankruptcy. If a restraining order needed a plenary suit as its foundation, the decision of this Court in *White vs. Schloerb* would have been a perversion of equity.

That the order made in this proceeding by the Court below was an order made in proceedings in bankruptcy is not, we suppose, seriously questioned. We claim that it was "necessary for the enforcement of the provisions" of the Bankruptcy Act, and the lienors claim that it was not necessary; and this question was the main question discussed by both the Courts below,

and is the main question on this review. Both the Courts below have determined that the threatened act of Metcalf Brothers & Company would have resulted *pro tanto* in a nullification of the Bankruptcy Act, because they were attempting to appropriate property by virtue of a lien which that act declared to be invalid. If the lien was not invalid, then no violation of the Bankruptcy Act is threatened, and, of course, there is no provision of it to be enforced, and the injunction was erroneous; but, if the lien was invalid, then it seems a waste of words to say that the restraining hand of the Court was necessary to enforce the provisions of the act. The writ of injunction is one of the most ancient prerogatives of the court of equity, and, as this Court has pointed out, and as it applied its ruling in *White vs. Schloerb*, it is within the class of "proceedings in equity" and "proceedings in bankruptcy" mentioned in Section 2.

"* * * In exercising the equity power which "pertains to this Court as a Court of Bankruptcy it is "not deemed necessary or proper that resort should be "had to the formal and plenary proceedings common "to suits in equity in the Circuit Court. A petition "stating the facts and praying for the order, relief or "proceeding sought for, is deemed sufficient."

Re Wallace, 2 Bankrupt Register, 52, at p. 53.

As Mr. Justice STORY said in the *Christy* case, there is nothing particularly sacred in the machinery of a plenary suit rather than in that of a summary proceeding. From the very nature of the case Courts of Bankruptcy must proceed by summary proceedings, and, as this Court has indicated in the *Bardes* case, under the present Bankruptcy Act they can proceed in no other way.

It has been pointed out in the United States Circuit Court of Appeals for the Eighth Circuit that, in determining bankruptcy controversies, the Courts have discretion whether they will act by plenary suit or sum-

marily on motion. Of course they cannot act by plenary suit unless a diversity of citizenship exists; but, where such diversity does exist, they may act in either way, and the usual and normal way is by summary proceedings. "*Ordinarily* they should act with as much ex- "pedition as possible when complaint is made that "under color of process the rights of third parties "have been invaded" (*In re Young*, 111 Fed. Rep., 158, at p. 161).

The cases that we have cited show that the power of restraining threatened interference with the hand of the Court has never been considered to be merely an exercise of jurisdiction belonging to plenary suits, but rather as an essential and universal component of the jurisdiction of the Court itself. As Judge LOWELL said in a case where a bankrupt sought an injunction to restrain his former wife from prosecuting in the State Court proceedings to obtain alimony already granted her by a decree of that Court: "This Court has therefore to "determine the effect of bankruptcy upon alimony. If "a discharge in bankruptcy will bar the wife's claim "for alimony, she may be enjoined from seeking "to collect it by contempt proceedings or other- "wise" (*In re Nowell*, 99 Fed., 931). The injunction was necessarily granted in a summary proceeding, and the opinion of Judge LOWELL was approved by this Court and characterized as "a careful opinion" (*Audubon vs. Shufeldt*, 181 U. S., 575, 578).

The clearest exposition of the inclusion of such injunction orders within the classification of orders and process "necessary for the enforcement of the provisions" of the Bankruptcy Act, is found in *White vs. Schloerb*, 178 U. S., 542. In that case the District Court went further than was asked for or done in this case, because the act complained of consisted of taking under writ of replevin in the State Court property belonging to the bankrupts. And the question certified to this Court was "Whether the District Court

" sitting in bankruptcy had jurisdiction by summary " proceedings to compel the return of the property " seized ? " Not the remotest suggestion appears anywhere in the opinion that the exercise of the power of injunction was considered as partaking in any respect of the nature of a plenary suit, or that it was anything but a proceeding in bankruptcy. The Court answers the question certified, as we submit it must answer the second question in this case, by placing in juxtaposition Section 720 of the Revised Statutes, recognizing the right to issue an injunction in bankruptcy proceedings, with Section 2, subdivision 15, of the Bankruptcy Act above quoted and Clause 3 of the Twelfth General Order in Bankruptcy. The writ of injunction in such a case as this is part and parcel of a proceeding in bankruptcy; it is authorized by the Twelfth General Order just mentioned, which in express terms authorizes application to a Court of Bankruptcy for an injunction to stay proceedings, and provides that it shall be heard and decided by a Judge.

The Court says (at p. 547):

> " By Section 720 of the Revised Statutes " ' the writ of injunction shall not be granted by " ' any court of the United States to stay proceed- " ' ings in any court of a State, except in cases " ' where such injunction may be authorized by " ' any law relating to proceedings in bankruptcy.' " Among the powers specifically conferred upon " the court of bankruptcy by section 2 of the " Bankrupt Act of 1898 are to (15) ' make such " ' orders, issue such process, and enter such judg- " ' ments, in addition to those specifically provided " ' for, as may be necessary for the enforcement of " ' the provisions of this act ' (30 Stat., 546). And " by clause 3 of the Twelfth General Order in " Bankruptcy applications to the court of bank- " ruptcy ' for an injunction to stay proceedings of

" ' a court or officer of the United States, or of a
" ' State, shall be heard and decided by the judge;
" ' but he may refer such an application, or any
" ' specified issue arising thereon, to the referee
" ' to ascertain and report the facts' " (172 U. S., 657).

Exactly the same reasoning was followed by the United States Circuit Court of Appeals in the case at bar.

" * * * As Section 67 gives the Court of Bank-
" ruptcy power to make orders in the premises, it
" was also proper for that Court to proceed as a Court
" of Bankruptcy, by order and notice upon a summary
" petition, and direct the Metcalfs not to go into
" the State Court upon their own motion and attempt
" to obtain payment. Subdivision 7 of Section 1 de-
" fines 'Court' to mean the Court of Bankruptcy in
" which the proceeding is pending, and to the Court
" of Bankruptcy power is specifically given by sub-
" division 15 of Section 2, ' to make such orders in
" ' addition to those specifically provided for as may
" ' be necessary for the enforcement of this act.'
" If this order is to be regarded as an injunction to
" stay proceedings of the State Court, it was author-
" ized by Clause 3 of the Twelfth General Order in
" Bankruptcy, which provides that applications to the
" Court of Bankruptcy for an injunction to stay
" proceedings of a Court of the State shall be heard
" and decided by the Judge."

In re Lesser, 5 Am. Bank. Rep., 320, at p. 325.

Smith vs. Mason, 14 Wall., 419, arose under the Act of 1867, which did not contain the provisions of the present Act relative to the issue of orders and process " necessary for the enforcement of the provisions of " this Act "; moreover, the injunction there complained of was much more than an injunction, and embodied an actual direction for the payment over of money.

Marshall vs. Knox, 16 Wall., 551, is similar to *Smith vs. Mason*, and subject to the same observations.

Peck vs. Jenness, 7 How., 612, came up on a writ of error to review the judgment of a State Court, which had upheld the title of a creditor who had levied an attachment prior to the bankruptcy. It overruled a rejoinder by the assignee setting up an injunction issued by the State Court against the attachment creditor, holding that § 720 of the United States Revised Statutes forbade Federal injunctions against proceedings in State Courts, and that the Bankruptcy Act of 1841 contained no provisions authorizing injunctions by the District Court. That section of the Revised Statutes has since been amended. The case is sharply distinguished from the present case by the fact that the Act of 1898 *does* authorize summary injunctions (*e. g.*, *White vs. Schloerb*, 178 U. S., 542).

Rouse vs. Letcher, 156 U. S., 47, simply asserted the comprehensive jurisdiction of the United States Circuit Courts over claims against property in the hands of the officers of that Court, and held that the jurisdiction in such case did not rest on diversity of citizenship. It was not a bankruptcy case.

Taylor vs. Carryl, 20 How., 583, merely held that where property has been levied on it is not liable to be taken by an officer acting under another jurisdiction.

Clark vs. Rist, 3 McLean, 494, cited by the learned counsel, was a case under the Act of 1841; it is not an authority on the question of jurisdiction at all. It merely holds that under the Act of 1841 the creditor in that case had a lien, valid under the laws of Ohio, which was expressly saved by the Bankruptcy Act of 1841, and that for that reason an injunction should not issue. The question of

whether the creditor had such a lien was then very fully discussed and there was no intimation that the Court would have refused an injunction if it had appeared that the creditor was not, as a matter of fact, saved in his lien by the Bankruptcy Act.

Ex parte Waddell, Fed. Cases, 17,027, appears misplaced in petitioners' brief. It contains an exhaustive review of the main subject, reaching a conclusion adverse to the petitioners' claim of a lien; it has been fully discussed by us *(supra*, p. 20*)*. But it has no bearing on the question of jurisdiction. It refused an order on the State Court receiver compelling him to turn over property in his hands. We have obtained no such order, nor asked for it.

Johnson vs. Bishop, Fed. Cases, 7,373. Here the Circuit Court naturally refused to grant an order directing the Sheriff holding the bankrupt's property under attachment from the State Court to deliver the property to the assignee in bankruptcy. If, in the case at bar, the property were all in the hands of the Receivers, and if we were asking for an order directing these Receivers to turn it over to us, then a comparison of the case cited in the light of the Act of 1867, under which it was decided, with the case at bar, in the light of the Act of 1898, under which the latter has been decided, might be profitable. But, as pointed out above, we have obtained no such order, nor asked for it. The only order asked or obtained was one restraining Metcalf Brothers & Co. from using their void judgment to seize from the Receivers property the title to which the Bankruptcy Law has vested in the trustee. Our remedy, it must be remembered, is a negative and partial one. It is by no means of the far reaching import which so excites counsel's apprehension. We have still the hardest part of our work in front of us. If the Receivers refuse to turn over the property, we must sue them, and

we cannot maintain our action except in the State Court. And even after we get the property, the Courts are open to the petitioners to sue us for its recovery. We are asking no judgment against them now, nor are we asking that they turn over any property. We are simply restraining them from taking forcible possession, under void process, of property which, presumptively at least, belongs to us.

Goodrich vs. Remington, 6 Blatchf., 515, must have been referred to by oversight. There the plaintiff brought suit in the United States Circuit Court as assignee in bankruptcy against the receiver appointed in the State Court of a bank which it was alleged really consisted of nothing but the bankrupt. This again might be of interest if we had asked or obtained an order directing the Receivers to transfer the property to us. It seems as if no authorities were needed to show that such relief would not be granted, and yet in this very case cited, the Court devotes practically the whole opinion to a discussion of the merits, and merely remarks in conclusion (at p. 520):

"As the decision is against the alleged right of the "plaintiffs to the subjects of controversy, it is also "unnecessary to consider the question raised by the "defendants, in regard to the right of the State Courts "to decide the questions of property involved, by rea-"son of their having, as it was insisted, obtained juris-"diction," *etc.*

Re Clark, Fed. Cases, 2,798, was merely another instance of the refusal of the Federal Court to interfere with the possession of the receiver in the State Court or to order him to turn property over to an assignee in bankruptcy.

Alden vs. Boston H. & E. R. Co., Fed. Cases, 152:

This case again seems misplaced in our opponents' brief. The Court holds, as it has always held, that a

railroad in the hands of receivers appointed by a State court must be regarded as being in the possession of that Court, and that it is not for another Court to interfere with such possession "*at least until the title* " *of the receivers is impeached for some cause for which* " *it is impeachable under the Bankrupt Act.*"

We do not rely on this language for our authority for the injunction, but we quote it as showing how widely divergent were the questions considered in the case cited from those in the case at bar. The only practical interest of the case cited lies, so far as we can make out, in the fact that the Federal Court did in that very case issue an injunction against the State Court receiver ; another instance of the writ of injunction as the well-recognized and long familiar instrument in the hands of Federal Courts on a summary application, rather than the monstrous and unheard-of weapon which the petitioners regard as invented by the Court below for the first time for this particular case.

Sedgwick vs. Menck, 1 N. B. R., 675 :

In that case the judgment creditor had not only filed his bill, but had *recovered judgment setting aside an assignment* by one Beiser ; and *nine years thereafter*, Congress having meanwhile passed a Bankrupt Act, and Beiser having become bankrupt, his assignee applied by bill to the United States Circuit Court to compel the State Court receiver to turn over to the assignee the property of the bankrupt which had been included in the void assignment. It goes without saying that the application was denied. There is not the faintest resemblance to the circumstances in the case at bar.

But nearly all these cases cited by petitioners either were under former and different Bankruptcy Acts or were not bankruptcy cases at all. In some of them, as we have seen, injunctions were allowed, which of itself is an absolute negation of

the petitioners' theory that injunctions may not be granted except in a plenary suit; and the only cases where relief was refused were where the applicant sought to have the Federal Courts take forcible possession of property in the hands of officers of State Courts.

In *re Gerdes*, 102 Fed. Rep., 318, the Court denied an application for an injunction staying proceedings begun before the bankruptcy to foreclose a mortgage made by the bankrupt before his bankruptcy. It is difficult to see on what ground such an application could have been granted.

In *re Kavanaugh*, 99 Fed. Rep., 928, Judge EVANS, sitting in the District of Kentucky, entertained the application on the merits, and on a state of facts somewhat similar to those in the case at bar arrived at a conclusion different from that of the Court below. But the application for an injunction is taken up and decided on its merits, and there is no suggestion that the District Judge doubted his power to issue a summary injunction on affidavits in a case where the judgment creditor's "lien" was in violation of section 67*f*.

Re Russell, 101 Fed. Rep., 248, has no bearing on the question of jurisdiction. There *a suit in the State Court was enjoined*, the Court remarking that Section 720 of the United States Revised Statutes prohibits Federal injunctions against proceedings in State Courts, *except injunctions under the Bankruptcy Act*, and that the case there presented was a proper case for injunction.

Frazier vs. Southern Loan and Trust Co., 99 Fed. Rep., 707, much relied on by our opponents, in fact makes our position clearer. As we have shown, the mere filing of a creditor's bill creates no general and absolute lien against equitable assets, but only an inchoate

lien, liable to be defeated by discontinuance of the action or by anything preventing final judgment; the appointment of a Receiver on behalf of the judgment creditor is the only way in which the permanence of the lien may be effected. It might be true that if the lien rested upon a receivership and possession thereunder, created more than four months prior to the bankruptcy, that in such case the Court might not prevent the lienors from enforcing all rights to the receivership assets subsequently conferred upon them, even though such rights might be conferred within four months of the bankruptcy; the receivership might perhaps preserve their rights. Even the New York State Courts, whose decisions are relied upon to maintain the theory that filing a creditor's bill gives a plenary lien, have intimated that it might be better to confine the rule to cases of a receivership (*Stewart vs. Isidor*, 5 Abb. Pr. N. S., 68, 70). Be that as it may, we mention it here merely to point out that the *Frazier* case, so much relied on, is in no way opposed to our contention, for in that case there had been a receivership in the creditor's suit in the State Court. It is difficult to see how an injunction could properly have been issued in such a case. The District Judge, whose decision was reversed, seems to have laid stress on the fact that the Receiver had nothing in his *possession*, and there were circumstances that made the State Court proceedings appear in some sense to work injustice. But the Circuit Court of Appeals paid very little attention to the notion of any plenary lien obtained by the filing of the creditor's bill, and reversed the case on the ground that whether or not the State Court by its receivership in the creditor's suit had *possession*, it had complete and exclusive control over the property. So far as that case bears at all upon the question of jurisdiction it is an authority in our favor, because, like the case just before referred to, it takes up on its merits an application for a summary injunction on petition, and

holds that in that particular case the petitioner is not entitled to an injunction, with no intimation of any reason why a summary injunction should not issue, where the facts warrant it, against a person attempting to enforce one of the alleged "liens" which the supreme law of the land, expressed in the Bankruptcy Law, has declared to be null and void.

Pickens vs. Dent, 106 Fed. Rep., 653, was decided on the principle of comity, a point not raised by the questions certified to this Court in the case at bar.

The order of the District Court should be affirmed with costs, and the questions certified answered as follows:

The first question, if answered at all, should be answered in the affirmative: "The District Court of the United States had jurisdiction to make the injunction order in question."

The second question should be answered in the affirmative: "Such jurisdiction could be exercised by summary proceedings."

The third question should be answered in the negative: "Metcalf Brothers & Co. did not, by the commencement of their creditors' action, acquire a lien on the property of the bankrupts superior to the title of the trustee thereto."

The fourth question should be answered in the negative: "The inchoate lien acquired by the commencement of the creditors' action was not perfected by a judgment obtained within four months prior to the filing of the petition of the Lessers in bankruptcy within the meaning of the provisions of the Act of Congress of July 1, 1898, known as the Bankruptcy Act."

The fifth question should be answered in the affirmative. "The judgment in the creditors' action was one which is avoided by the provisions of the Act of Congress of July 1, 1898, known as the Bankruptcy Act."

All of which is respectfully submitted.

Washington, October Term, 1901.

OTTO T. HESS,
M'CREADY SYKES,
Of Counsel for Trustee in Bankruptcy, Respondent.

Supreme Court of the United States.

No. 57.—October Term, 1902.

Metcalf Brothers & Company, Petitioners,
vs.
Benjamin Barker, Jr., Trustee in Bankruptcy of Lesser Brothers.

On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

[December 1, 1902.]

The certificate in this case is as follows:

"This matter came before this court upon a petition of Metcalf Brothers & Co. to superintend and revise in matter of law certain proceedings of the District Court of the United States for the Southern District of New York, wherein an order was made by said District Court enjoining the petitioners, Metcalf Brothers & Co., from taking any further proceedings under any judgment obtained by them in the Supreme Court of the State of New York in a judgment creditors' action wherein certain transfers made by the bankrupts had been set aside as to them as fraudulent and void, and wherein receivers of the property of the bankrupts appointed by the said Supreme Court had been directed to pay to them the amount of their judgments at law upon which their said judgment creditors' action was founded.

"For its proper decision of the matter this court desires the instruction of the Supreme Court upon the questions of law hereinafter stated, and hereby certifies the same to the Supreme Court of the United States for that purpose.

Statement of Facts.

"On the 2d of October, 1896, Lesser Brothers, subsequently adjudged bankrupts, who were copartners, being then insolvent, transferred all their property, copartnership and individual, to certain favored creditors. All their outstanding accounts, being copartnership property, they transferred by instruments of assignment to Marcus A. Adler and others. They confessed various judgments in the Supreme Court of the State of New York in favor of Bernhard Moses and others, upon which executions were at once issued to the sheriff of the county of New York, who levied thereunder on all their tangible personal property, consisting of clothing material and stock in trade. This also was copartnership property, and, with the book accounts, comprised all their property except a piece of real estate owned by Israel Lesser individually and a ground lease of another piece of real estate owned by Tobias Lesser individually. These two pieces of real estate the individuals owning them conveyed to Joseph Lilianthal.

"After making these transfers and after the levy by the sheriff under the executions issued upon the confessed judgments and on the same day, by a fraud upon the court, in a collusive action in the Supreme Court of New York to dissolve the partnership, they procured the appointment of a re-

ceiver of the partnership property, Morris Moses, who was nominated by and in collusion with them. Subsequently a receiver nominated by certain creditors, James T. Franklin, was associated with Mr. Moses by the same court.

"Various creditors of the bankrupts immediately commenced actions of replevin to recover portions of the goods in the hands of the sheriff. Their claims were conflicting with each other and with those of the confessed-judgment creditors, and in an action brought in the Supreme Court of New York by the receivers an order was made restraining the sale by the sheriff under the executions, directing a sale by receivers (Mr. Moses and Mr. Franklin being also appointed such receivers in that action), and that the latter should hold the proceeds of the sale subject to the claims of all parties, such claims to be determined in that action. Pursuant to this order, the goods were sold, and the receivers so appointed now hold the proceeds thereof. This order was made November 23, 1896. The action is still pending, undetermined.

"On the 22d day of October, 1896, and the 29th day of October, 1896, Metcalf Brothers & Co. procured judgments in the Supreme Court of the State of New York against the Lessers for $930.21 and $2,547.80 respectively, upon which executions were issued and returned unsatisfied.

"On the 17th day of December, 1896, Metcalf Brothers & Co. commenced a judgment creditors' action in the Supreme Court of the State of New York, which came to trial on the 17th day of December, 1897, and as a result of which the transfers to which reference has been made and the proceedings for the appointment of the receivers were adjudged fraudulent and void as to them. The court, however, set aside the transfers of the copartnership property, not only in favor of Metcalf Brothers & Co., but also in favor of the receivers. It set aside the transfer of the real estate in favor of Metcalf Brothers & Co. alone. Judgment was entered on this decision April 6, 1898.

"This judgment determined that the proceeds of the sale of the tangible property then in the hands of the receivers and the outstanding accounts or their proceeds in the hands of the transferees (to be accounted for under the judgment to the receivers) were to be administered by the receivers for the benefit of all the creditors of the copartnership equally, including Metcalf Brothers & Co., while the real estate transferred became subject to the lien of the judgments of Metcalf Brothers & Co. on October 22d and 29th, 1896.

"All parties except the receivers appealed from this judgment to the appellate division of the Supreme Court of New York; that court affirmed the judgment of the trial court as to the fraud, but reversed it in so far as it granted relief in favor of the receivers. It directed the payment by the receivers to Metcalf Brothers & Co. of the amount of their judgments out of the money in the receivers' hands, and, since Metcalf Brothers & Co. were to be so paid, it reversed the judgments in their favor against Adler, one of the transferees of the accounts. Upon the ground that there was no proof of fraud, it also reversed it against the transferee of the real estate.

"This decision was embodied in an instrument made the 30th day of December, 1898, entitled an 'order,' but which, after reciting the necessary facts, 'ordered and adjudged' that the judgment of the trial term be modified as stated, and also 'ordered and adjudged' that the transfers in question, except the transfer of the real estate, were fraudulent and void

as to Metcalf Brothers & Co.; that the receivers be, and they were thereby, directed to pay to Metcalf Brothers & Co. the amount of their judgments, with costs, and that final judgment should be entered in accordance therewith. This instrument was filed in the office of the clerk of the appellate division of the Supreme Court of New York, and was the only paper signed by that court or kept in its records. A certified copy of it was transmitted to the clerk of the Supreme Court, upon which, after the costs had been taxed, a final judgment was entered by the latter clerk on the 31st day of January, 1899, following in all essential respects its verbiage. The delay in the entry of final judgment was caused by various motions before the appellate division for reargument.

"On the 12th day of May, 1899, Lesser Brothers filed in the District Court of the United States for the Southern District of New York a petition to be adjudged bankrupts, and they were adjudicated bankrupts on that day. Subsequently, and on the 7th day of June, 1899, Benjamin Barker, Esq., was appointed their trustee in bankruptcy.

"From the judgment of the appellate division in the action brought by Metcalf Brothers & Co. all parties except Lilianthal, the transferee of the real estate, appealed to the Court of Appeals of the State of New York. That court affirmed the judgment of the appellate division in favor of Metcalf Brothers & Co., and also restored to them the rights awarded them by the judgment of the trial court, of which they had been deprived by the appellate division. The final result of the litigation was that the transfers in question were declared fraudulent and set aside in favor of Metcalf Brothers & Co. only; that as to all other persons they were (until impeached in a proper action) valid; that the receivers were directed to pay out of the funds in their hands to Metcalf Brothers & Co. the amount of their judgments, and that those creditors could also proceed for the collection of their judgments, if necessary, against the transferees of the accounts and real estate.

"The decision of the Court of Appeals was made on the 6th of February, 1900. The remittitur from that court to the Supreme Court was received and filed on the 12th day of March, 1900. On the 8th day of March, 1900, the bankrupts' trustee, upon affidavits of himself and his counsel, procured from the District Court of the United States for the Southern District of New York an order, entitled in the bankruptcy proceeding, requiring Metcalf Brothers & Co. to show cause on the 13th day of March, 1900, why a writ of injunction should not issue enjoining them from taking any further proceedings under any judgment in their creditors' action and so enjoining them in the interim. This order provided for its service upon the members of the firm of Metcalf Brothers & Co., but it was not in fact served upon any one but their attorneys in their judgment creditors' action. Metcalf Brothers & Co. appeared specially upon the return day of the order to show cause and filed a written objection that the District Court was without jurisdiction, power, or authority over them in the premises; that no action or other proceeding was pending or had ever been begun against them in any way relating to the subject-matter of the proposed injunction; that they had not appeared in or been made a party to any proceeding founded upon the petition of Lesser Brothers to be adjudged bankrupts, and that they had not been brought into court on any process or been given any notice of the order to show cause except that their attorneys in their creditors' action had received a

copy thereof, and especially that no statute conferred upon the District Court jurisdiction, power, or authority to issue any writ of injunction in the premises.

"Their objection was overruled, and after an argument of the merits of the application the injunction was continued.

"Subsequently Metcalf Brothers & Co. presented a petition to this court to superintend and revise in matter of law the said proceedings of the District Court.

Questions Certified.

"Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision are:

"1. Had the District Court of the United States for the Southern District of New York jurisdiction to make the injunction order in question?

"2. If said court had jurisdiction to restrain Metcalf Brothers & Co. from receiving the fund in question, could such jurisdiction be exercised by summary proceedings?

"3. Did Metcalf Brothers & Co. by the commencement of their creditors' action acquire a lien on the property of the bankrupts superior to the title of the trustee thereto?

"4. If the lien acquired by the commencement of the creditors' action was inchoate merely, was it perfected by a judgment obtained more than four months prior to the filing of the petition of the Lessers in bankruptcy within the meaning of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?

"5. If the lien acquired by the commencement of the creditors' action was inchoate merely, was the judgment in the creditors' action, whenever obtained, one which is avoided by any of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?"

Mr. Chief Justice FULLER delivered the opinion of the Court:

Metcalf Brothers & Company, judgment creditors of Lesser Brothers, commenced their creditor's suit in the Supreme Court of New York December 17, 1896. The case came to trial December 17, 1897, and decree was rendered April 6, 1898. 22 Misc. Rep. 664. On appeal the appellate division affirmed the judgment of the trial court in part, and reversed it in part, and directed the payment by the receivers to Metcalf Brothers & Company of the amount of their judgments out of the money in the receivers' hands. 35 App. Div. 596. This decree or judgment was embodied in an order dated December 30, 1898, but the clerk of the Supreme Court appears not to have entered it until January 31, 1899. The decision of the Court of Appeals, 161 N. Y. 587, was made February 6, 1900, and the remittitur was received and filed in the court below March 12, 1900.

The bankruptcy law was approved July 1, 1898. May 12, 1899, Lesser Brothers filed their petition in bankruptcy and were adjudicated bankrupts, and Barker was appointed trustee June 7, 1899. March 8, 1900, the bankrupts' trustee procured from the District Court an order entitled

in the bankruptcy proceedings requiring Metcalf Brothers & Company to show cause on March 13 why a writ of injunction should not issue enjoining them from taking any further proceedings under any judgment in their creditor's action, and so enjoining them in the interim, which injunction, after argument on the merits, was continued. No question arises here in respect of real estate, and on the case stated in the certificate the property affected was equitable assets. There had been tangible personal property, subject to levy and sale under execution, but this had been previously sold by an order of the Supreme Court of New York and the proceeds were held by receivers.

The general rule is that the filing of a judgment creditor's bill and service of process creates a lien in equity on the judgment debtor's equitable assets. *Miller* v. *Sherry*, 2 Wall. 237; *Freedman's Savings & Trust Company* v. *Earle*, 110 U. S. 710. And such is the rule in New York. *Storm* v. *Waddell*, 2 Sandf. Ch. 494; *Lynch* v. *Johnson*, 48 N. Y. 27; *First National Bank* v. *Shuler*, 153 N. Y. 163. This was conceded by the District Court, but the court held that the lien so created was "contingent upon the recovery of a valid judgment, and liable to be defeated by anything that defeats the judgment, or the right of the complainants to appropriate the fund;" that "such a contingent or equitable lien, it is evident, cannot be superior to the judgment on which it depends to make it effectual, but must stand or fall with the judgment itself;" and that "section 67*f*, therefore, in declaring that a judgment recovered within four months 'shall be deemed null and void,' &c., necessarily prevents the complainants from acquiring any benefit from the lien, or the fund attached, except through the trustee in bankruptcy *pro rata* with other creditors," it being also held that, although the judgment at special term was rendered more than four months before the filing of the petition, yet that the judgment of the appellate division, as affirmed by the Court of Appeals, was within the four months. 100 Fed. Rep. 143.

Assuming that the judgment at special term is to be disregarded, and that the judgment of the appellate division was entered within the four months, it will be perceived that if the views of the District Court were correct, the third question propounded should be answered in the negative, while if incorrect, that question should be answered in the affirmative.

Doubtless the lien created by a judgment creditor's bill is contingent in the sense that it might possibly be defeated by the event of the suit, but in itself, and so long as it exists, it is a charge, a specific lien, on the assets, not subject to being divested save by payment of the judgment sought to be collected.

The subject was fully discussed and the effect of bankruptcy proceedings considered by Vice Chancellor Sandford in *Storm* v. *Waddell*, which has been so repeatedly recognized with approval as to have become a leading case.

As Mr. Justice Swayne remarked, in *Miller* v. *Sherry*, the commencement of the suit amounts to an equitable levy, 2 Wall. 249; or, in the language of Mr. Justice Matthews, in *Freedman's Savings & Trust Company* v. *Earle*, "It is the execution first begun to be executed, unless otherwise regulated by statute, which is entitled to priority. The filing of the bill, in cases of equitable execution, is the beginning of executing it." 110 U. S. 717. And the right to payment out of the fund so vested cannot be affected by a subsequent transfer by the debtor, *McDermutt* v. *Strong*, 4 Johns. Ch. 687, or taken away by a subsequent discharge in bankruptcy. *Hill* v. *Harding*, 130 U. S. 699; *Doe* v. *Childress*, 21 Wall. 642; *Eyster* v. *Gaff*, 91 U. S. 521; *Peck* v. *Jenness*, 7 How. 612.

Kittredge v. *Warren*, 14 N. H. 509, was relied on as to the effect of attachments on mesne process in New Hampshire in *Peck* v. *Jenness*. And it may be remarked that Chief Justice Parker's vigorous discussion in that case of the point that the attachment lien was not contingent on a subsequent judgment is *a fortiori* applicable in cases where the prior establishment of the creditor's claim is the foundation of the creditor's suit.

Granting that possession of the power "to establish uniform laws on the subject of bankruptcies" enables Congress to displace these well-settled principles and to divest rights so acquired, we do not think that Congress has attempted to do so.

Section 67*f* provides: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect."

In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so the date

of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial.

Moreover other provisions of the act render it unreasonable to impute the intention to annul all judgments recovered within four months.

By section 63*a*, fixed liabilities evidenced by judgments absolutely owing at the time of the filing of the petition, or founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of application for discharge, may be proved and allowed, while under section 17 judgments in actions of fraud are not released by a discharge, and other parts of the act would be wholly unnecessary if section 67*f* must be taken literally.

Many of the District Courts have reached and announced a similar conclusion: *In re Blair*, 108 Fed. Rep. 529; *In re Beaver Coal Company*, 110 Fed. Rep. 630; *In re Kavanaugh*, 99 Fed. Rep. 928; *In re Pease*, 4 Amer. Bank. Rep. 547; as have also the Supreme Court of Rhode Island and the Chancery Court of New Jersey in well-considered decisions. *Doyle* v. *Heath*, 22 R. I. 213; *Taylor* v. *Taylor*, 59 N. J. Eq. 86. And see *Wakeman* v. *Throckmorton*, 51 Atl. Rep. 554.

As under section 70*a*, *e*, and section 67*e*, the trustee is vested with the bankrupt's title as of the date of the adjudication, and subrogated to the rights of creditors, the foregoing considerations require an affirmative answer to the third question, but in answering the first question some further observations must be made. This creditors' action was commenced December 17, 1896, more than eighteen months before the passage of the bankruptcy act, and was prosecuted with exemplary diligence to final and complete success in the judgment of the Court of Appeals. At this point the bankruptcy court intervened and on summary proceedings enjoined Metcalf Brothers & Company from receiving the fruits of their victory. The State courts had jurisdiction over the parties and the subject matter, and possession of the property. And it is well settled that where property is in the actual possession of the court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control.

In *Peck* v *Jenness*, 7 How. 612, the District Court had decided that the lien of an attachment issued out of a court of New Hampshire was defensible and invalid as against an assignee in bankruptcy. But this court held that this was not so, and that the District Court had no supervisory power over the State courts, and Mr. Justice Grier said: "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of the court, and the right of a plaintiff to prosecute his

suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. . . . The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." The rule indicated was applied under the act of 1841 in *Clark* v *Rist*, 3 McLean, 494; under the act of 1867, by Mr. Justice Miller in *Johnson* v *Bishop*, Woolworth, 324, and by Mr. Justice Nelson in *Sedgwick* v *Menck*, 21 Fed. Cases, 984, and under the act of 1898, among other cases, by the Circuit Court of Appeals for the Fourth Circuit in *Frazier* v. *Southern Loan and Trust Company*, 99 Fed. Rep. 707, and *Pickens* v. *Dent*, 106 Fed. Rep. 653.

White v. *Schloerb*, 178 U. S. 542, proceeded on the familiar doctrine that property in the custody of a court of the United States cannot be taken out of that custody by any process from a State court, and the jurisdiction of the District Court sitting in bankruptcy by summary proceedings to maintain such custody was upheld. Mr. Justice Gray, speaking for the court, said: "By section 720 of the Revised Statutes 'The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' Among the powers specifically conferred upon the court of bankruptcy by section 2 of the bankrupt act of 1898 are to '(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act.' 30 Stat. 546. And by clause 3 of the Twelfth General Order in Bankruptcy applications to the court of bankruptcy 'for an injunction to stay proceedings of a court or officer of the United States, or of a State, shall be heard and decided by the judge; but he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.' 172 U. S. 657. Not going beyond what the decision of the case before us requires, we are of opinion that the judge of the court of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody."

This cautious utterance—and courts must be cautious when dealing with a conflict of jurisdiction—sustains as far as it goes the converse of the proposition when presented by a different state of facts.

We are of opinion that the jurisdiction of the District Court to make the injunction order in question cannot be maintained. *Louisville Trust Company* v. *Comingor*, 184 U. S. 18, 26.

The first question will be answered in the negative, and the third question in the affirmative, and it is unnecessary to answer the other questions.

Certificate accordingly.

True copy.

Test:

Clerk Supreme Court, U. S.